BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BAY AREA RAPID TRANSIT DISTRICT 300 Lakeshore Drive, 18th Floor Oakland, CA 94612 Employer	Docket No. 09-R2D2-1218 through 1221 **DECISION AFTER RECONSIDERATION and ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following decision after reconsideration and order of remand.

JURISDICTION

Beginning on October 14, 2008, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Bay Area Rapid Transit District (Employer or BART). On April 1, 2009, the Division issued 4 citations to Employer alleging 4 serious violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

Citation 1 alleged a violation of section 2944(c) [unqualified worker working near high-voltage collector shoes]. Citation 2 alleged a violation of section 3203(a)(6) [failure to implement methods to correct unsafe conditions]. Citation 3 alleged a violation of section 3273(b) [failure to maintain walkways free of obstructions]. Citation 4 alleged a violation of section 3332(b) [ineffective controls to safeguard personnel during railcar movement]. All citations were initially classified as serious. Employer filed timely appeals. Prior to the hearing, Division moved to amend the classification of citations 3 and 4 to allege they were accident-related violation, and this motion was granted.

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

Administrative proceedings were held, including an evidentiary hearing before an administrative law judge (ALJ) of the Board. Service Employees International Union Local 1021 (Third Party or SEIU) was granted party status and participated in the appeal. After taking testimony and considering the evidence and arguments of all parties, the ALJ issued a Decision on April 14, 2011, sustaining the violations alleged in citations 2, 3 and 4, and upholding the serious, accident-related classification of citation 4, and the serious classification of citation 2.

The Appeals Board ordered reconsideration on its own motion to consider whether the ALJ should have relied on Title 8, Cal. Code of Regulations, section 386 (hereafter Rule 386) and considered amending the classification of citations 2 and 4 to willful so as to conform the allegations in the citations to the evidence presented at the hearing.

Employer answered, arguing the Board lacks the authority to request the ALJ to consider the application of Rule 386. The Division and SEIU also answered urging that the classification of citations 2 and 4 be amended to willful by the Board.

In addition, Employer petitioned for reconsideration asserting the ALJ erred in the following ways:

1) By concluding BART failed to inspect and implement a correction of the hazardous, shrubbery-invaded portion of the pedestrian walk path adjacent to the track and thus committed a serious violation of 3203(a)(6)(Citation 2);
2) By upholding Citation 3, and concluding section 3273(b) applied to the permanent walkway which was not maintained free of obstructions;
3) By concluding section 3332(b) applied to BART, and that BART's failure to implement effective controls was established by the use of the inadequate "Simple Approval" procedure which failed to account for the impossibility of the deceased worker to use that procedure and protect his own safety due to the physical layout of the workplace. (Citation 4).

And, the Division filed a petition for reconsideration alleging error in the Decision for finding the evidence of the serious, accident-related classification was insufficient regarding Citation 3, Item 1.

Third Party answered these Petitions. Employer and Division each answered the other's petition for reconsideration.

We address first the arguments raised regarding amending citations 2 and 4 through Rule 386. Then we address the various contentions concerning each citation. Because this order and decision is not a final order or decision of the Appeals Board, Employer's right to seek a writ of review under Labor

Code section 6627 does not arise until the proceedings ordered herein are completed.

EVIDENCE

Testimony and documents were submitted to demonstrate how a fatal accident occurred when a BART train struck an on-foot worker. The Board has reviewed the record and concludes the Decision accurately describes the evidence and the circumstances of the accident and we adopt that description by this reference. The pertinent facts are briefly summarized here.

The BART track where the fatal injury occurred was between the Concord and Pleasant Hill stations. The configuration consists of two parallel tracks situated approximately four feet apart, running generally in a north-south direction. The two sets of tracks are bordered on both sides with fencing to separate the tracks from the surrounding neighborhood. Within the fenced area, the "third rail"[2] carrying power for both trains runs between the two sets of tracks. Each track sits atop a 15 to 18 inch high platform of ballast (crushed rock). Approximately 35 inches from the outer, or fence-ward rail of each track, the ballast slopes downward approximately 12 to 15 inches. There, at approximately 60 inches from the outer rail, is a walking path ("toepath") for use by BART employees. For approximately one half to one mile along this area of track, at least between mileposts 17.9 to 18.4, large oleander bushes grow between the westerly fence and the adjacent toepath, and extend over the toepath making its use difficult or impossible.

On the day of the accident, BART employee Strickland was assigned to inspect on foot approximately one mile of the western fence northward of milepost 17.76. Another BART employee began inspecting the eastern fence by walking southward from a location approximately 1.1 miles north of Strickland's starting point. While trains usually ran on both tracks, and the western track usually carried trains running in a southerly direction, on the day of the accident other BART maintenance workers were working on the easterly track, and so the westerly track was used to carry both northbound and southbound trains. Walking north, Strickland faced the southbound trains, but the northbound trains approached him from behind. Approximately 80 feet north of the 18.3 mile marker, Strickland was stuck by a northbound train.

Before Strickland began inspecting this segment of track, he informed the Operations Control Center (OCC) that he was entering the area. BART has two procedures it uses to allow workers to work and move in areas close to or on the tracks, "Simple Approval" and "Work Orders". Simple Approval is notice

[2] The "third rail" is actually two energized rails running side by side, one for use by each opposite running train.

to the OCC by a worker that he will be wayside, or near the track. The Simple Approval procedure[3] requires workers to be aware of their own surroundings, and responsible for their own safety. The Simple Approval procedure does not result in train operators being informed of possible on-foot employees, nor does it result in actual information to the on foot employees of whether the track they are working near, or on, will be carrying trains, and if so, how often. The procedure deprives employees of this information intentionally. The proffered reason for depriving workers of this information is so that workers stay alert at all times and expect a train at any time.

The portion of the track in question usually carries trains approximately every 15 minutes on each track. On the day of the accident, when Strickland began his inspection activities at a different location along this portion of track, at approximately 8:00 a.m., trains were running normally along this area of the tracks, that is, northbound trains on the easterly track (C-1), and southbound trains on the westerly track (C-2). Strickland called in a "Simple Approval" for the first wayside inspection. When Strickland called for and received a second "Simple Approval" at 9:04-05 a.m., regarding the inspection beginning at mile marker 17.76, the easterly track had been shut down, and trains were "double-tracking", or running northbound and southbound, on the westerly track. This specific information was not shared with Strickland when he called in to give this second Simple Approval notice to the OCC for inspecting the area of track where the oleanders overgrew the toepath. None of the three train operators who drove that area of track after 9:05 a.m. were informed of the presence of Strickland near or on the track. Two trains proceeded south on the westerly track past Strickland's location. Thereafter, the first northbound train on the westerly track struck and killed him at approximately 9:30 a.m.

BART had no method of observing or inspecting for the known hazardous overgrowth of the oleander bushes along this segment of track. Numerous employees reported the obstruction created by the oleanders, after which BART periodically cut back the bushes, but they grew back within a few months, again creating the obstruction of the toepath. On the date of the accident, the toepath was overgrown by oleanders such that on foot workers were required to enter the path of the train ("foul the track") in order to proceed northward and inspect the western structures along the track, such as the fence.

DECISION

1. Citations 2 and 4 may be amended under Rule 386.

Rule 386 states:

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[3] OCC can deny "Simple Approval" when a wayside worker requests, or the OCC can convert the Simple Approval request in to a "work orders" procedure and interrupt or alter train use of affected track portions.

> (a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision in order to:
> (1) Correct a clerical error;
> (2) Address an issue litigated by the parties;
> (3) Amend the section number cited in the citation if the same set of facts apply to both the cited and proposed sections; or
> (4) Amend any part of the Division action to conform it to a statutory requirement.
> (b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby. If such prejudice is shown, the amendment shall not be made.

Under subsection (a)(2), the Board may amend the issues on appeal to address an issue litigated by the parties. The issue litigated was, in the broad sense, the classification of citations 2 and 4, but in the specific sense, evidence was presented to show the Employer knew of the violative condition and took no steps to correct it. Through that litigation, evidence is in the record that shows Employer demonstrated willful conduct in its violations of section 3203(a)(6) and 3332(b). Thus, the parties actually litigated whether a willful classification was shown. As such, the Board may order the amendment of the Division action. (§ 386(a)(2).)

Rule 386 has another requirement. Specifically, all parties must be notified "of the intended amendment" and be given "the opportunity to show the party will be prejudiced thereby." (§ 386(b).) Whether the Board's Order of reconsideration provided this notice must be considered.

The Board's Order stated: "The issue to be considered is: Whether the ALJ should amend Citations 2 and 4 to reclassify the violations to willful, and increase the penalties accordingly, after giving the parties notice under Board Regulation, section 386. Either party may file an answer with the Appeals Board within 30 days of service of this Order of Reconsideration."

This Order apprised the parties that the ALJ may, at some time in the future, issue a notice of an intended amendment, not that the Board was considering undertaking an amendment directly. Because it refers to an additional opportunity, other than by way of answer to the Order of Reconsideration, to assert any prejudice from the proposed amendment, we conclude our Order of Reconsideration is not adequate notice under Rule 386.

We agree with Division and Third Party that Rule 386 does not require the Board to remand such amendment considerations to its ALJs. In order to

directly amend the division action, or the appeal, the Board must clearly notify the parties that it intends to consider such amendment directly, thus providing the parties with notice that they must, at that time, show how they may be prejudiced by the amendment.[4] In this case, the Board did not make this clear to the parties. Indeed, Employer's answer asserts the Board may not, itself, order an amendment under Rule 386. The answer does not address the issue of prejudice resulting from an amendment.

Instead, Employer asserts the Board's role as a "neutral arbiter" limits -- to the point of prohibiting -- the Board's ability to amend a citation in any way beyond that which is alleged or requested by the Division.[5] This argument ignores the mandate in Labor Code section 6603 that Board procedural rules comply with the Government Code section 11516. Government Code section 11516 states:

> The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

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[4] The Board may directly, or through an ALJ, issue a Notice of Proposed Amendment. (386(b).) Since whichever officer issues the Notice must evaluate the evidence and arguments responsive to the Notice, the Board elects in this case to assign this task to the ALJ.

[5] Employer cites Decisions After Reconsideration, rather than statutes, for this proposition. Specifically, Employer cites *UPS*, Cal/OSHA App. 08-2049, Decision After Reconsideration (Jun. 25, 2009) *California State Department of Forestry*, Cal/OSHA App. 85-1378, Decision After Reconsideration (Aug. 28, 1986), *Marin Storage & Trucking, Inc.* Cal/OSHA App. 90-148, Decision After Reconsideration (Oct. 25, 1991), and *Paramount Farms*, Cal/OSHA App. 92-176, Decision After Reconsideration (Mar. 10, 1993). None of these cases are sufficiently similar to the pending matter to be persuasive. In *UPS*, the Board denied a third party employee's petition for reconsideration because he lacked authority to prohibit a settlement between the Division and the Employer with which he disagreed. The case does not address the Board's authority to amend a citation. In *California State Dept of Forestry*, the Board granted Union's request for third party status after the ALJ issued an order accepting the parties' settlement. Rather than an instance of the Board lacking power to act after the ALJ issues a Decision, this case demonstrates the Board's authority to revise procedures undertaken, or not taken, by an ALJ. The case also stands for the well founded proposition that the Board will not review an exercise of prosecutorial discretion by the Division. However, the prosecutorial discretion of the Division does not prohibit the Board from amending a citation as authorized by Government Code section 11516. *Marin Storage* concludes an ALJ erred in notifying the parties of his intent to amend the citation to change the classification from general to serious, and then so amending after holding additional hearings. The decision ignores the requirement in Labor Code section 6603 that our rules must be consistent with Government Code section 11516, and thus demonstrates weakness in its reasoning. We decline to follow a prior Board decision that is poorly reasoned, lacks reference to governing statutes, and reaches the wrong conclusion than what is required by those statutes. Last, *Paramount Farms* concluded an ALJ did not exceed his proper role by declining to develop the Independent Employee Action defense which the employer did not specifically plead, but arose from the written statement that the employee removed the guard. This case affirms the discretion of the ALJ to decline to use Rule 386 to amend a citation or an appeal; it does not stand for the proposition that the Board is prohibited from asking its ALJ to consider using Rule 386, or that the Board is prohibited from using Rule 386 itself to process an amendment to either the Division action or the employer's appeal.

The Labor Code requires the Board to enact rules that are consistent with this provision. (Lab. Code § 6603.)

Government Code section 11516 empowers the adjudicating agency to order amendment of the accusation. In OSH matters, the accusation is the citation and notice of penalty. The Government Code makes clear that if prejudice is shown, a hearing shall be set to cure that prejudice. Nowhere in the rule is the adjudicating agency required to defer, at any time, to the enforcement agency when considering amending an accusation after an evidentiary hearing has concluded and the accusation needs to be conformed to the proof presented at the hearing. (*Flatiron Construction Corp.*, Cal/OSHA App. 10-2789, Denial of Petition for Reconsideration (Dec. 13, 2011); See *Stearns v. Fair Employment Practices Comm'n*, (1971) 6 Cal. 3d 205.)

Last, Employer makes the argument that since the decision of the ALJ did not make a finding or determination of "willful", that the Board lacks the authority to reconsider on that basis, citing sections 361.3[6], and 390.2[7]. These rules state the issues on appeal are those set forth in the Division action that is contested, and that the Board may order reconsideration of any matter "determined or covered by the order or decision". Rule 390.2 places no limit on the Board in reconsidering the legal effect of factual matters contained in an ALJ Decision. Any "matter" "covered" by the ALJ decision is within the authority of the Board to reconsider. This is in addition to any matter "determined" in an order or decision. When facts in the Decision show an employer acted willfully, but the Decision does not conclude the employer acted willfully, the "matter" of the willful conduct of an employer is "covered" by the Decision.

For these reasons, we are not persuaded that the classification of a violation is beyond the amendment authority of the Board when the record contains evidence of such classification. We remand the matter to the ALJ to consider the applicability of Rule 386 to these proceedings.

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[6] "The issues on appeal shall be limited to those set forth in the Division action that is contested by a docketed appeal, subject to the following limitations: (a) If the Division action appealed from is a citation, the employer must specify on the appeal form which one or more of the following issues it is raising in its appeal; (1) The existence of the violation alleged in the underlying citation; (2) The classification of the violation; (3) The abatement period; (4) The reasonableness of the changes required by the Division to abate the violation; or (5) Only the reasonableness of the proposed penalty." If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal shall be limited to the classification of the violation and the reasonableness of the proposed penalty, unless a timely motion pursuant to Section 371 is granted to amend the appeal to contest the existence of the violation, the abatement period, or the reasonableness of the changes required by the Division to abate the violation." (Rule 361.3 [subsection (b), (c), and (d) refer to repeat citations, failure to abate citations and revocation of abatement credit and are omitted here because they are not relevant to this appeal.])

[7] "(a) At any time within 30 days of the filing of any order or decision, the Appeals Board may, on its own motion, order reconsideration with respect to any matters determined or covered by the order or decision." (Rule 390.1(a)[subpart (b) is omitted here because it governs notice of and reply to such orders of reconsideration and is not relevant to this discussion.])

2. Citation 2 was properly affirmed.

Employer alleges Citation 2 was upheld due to a legal error, arguing that its failure to inspect and correct the hazardous, shrubbery-invaded portion of the pedestrian walk path adjacent to the track did not establish a violation of 3203(a)(6). On review of the entire record, and all arguments submitted by Employer, the Division, and the SEIU Local 1021, it is clear that a violation of 3203(a)(6) was established.

Section 3203(a)(6) requires employers to have procedures in place to identify and correct hazards.

> [E]very employer shall establish, implement and maintain affective Illness and Injury Prevention program (Program). The Program shall be in writing and shall, at a minimum:
> (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 safety order requires employers to establish, implement and maintain such procedures. Thus, a written plan that states "action shall be taken on reported unsafe conditions" may satisfy the requirement to establish a written plan. Such, however, does not show the plan was implemented. Rather, proof of implementation requires evidence of actual responses to known or reported hazards. Conversely, proof of failure(s) to respond to known or reported hazards establishes a violation of this section through a failure to implement a plan. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470 Decision After Reconsideration (Apr. 5, 2002)[employer's failure to train employee in accordance with its own sufficient written training program was failure to implement the training portions of an IIPP as required by 3203(a)].)

The record establishes Employer received multiple reports of the hazard created by the shrubbery overgrowing and obstructing the toepath at and around mile marker 18.3. Employer was made aware that on-foot workers had to enter the path of the train ("foul the track") in order to proceed along the

wayside, as the shrubbery condition made use of parts of the toepath impossible. Employer was also aware, due to prior reports by operators, that the shrubbery obstructed the train operator's view of the toepath. The shrubbery overgrowing the toepath created a hazardous condition, of which employer was aware, but regarding which it failed to implement corrective measures as required by 3203(a)(6). The record fully supports the Decision upholding the violation.

We decline to reverse findings by and Administrative Law Judge in the absence of compelling evidence to the contrary. (*Lamb v. Workers' Compensation Appeals Bd.* (1978) 11 Cal.3d 274.) Here, Employer argues "there is no evidence in this record that the deceased ever walked on the toepath adjacent to the C2 track. Since he was assigned to view the fence, he may have been walking in an area adjacent to the fence – not adjacent to the trackway – particularly since there could be a question of whether he may have been able to see the fence from the trackway, given the existing shrubbery." (Emphasis in original.) The evidence in the record shows the toepath was impassible, and the shrubbery grew between the track and the fence. That the shrubbery may have also impeded decedent's ability to inspect the fence in no way counters the evidence that supports the violation of section 3203(a)(6), which is established by the shrubbery hazard being reported to but not corrected by Employer.

Employer fails to point to compelling evidence to contradict the findings of the ALJ, and so provides no basis to reverse the Decision. Moreover, to conclude the shrubbery did not create a hazardous condition that remained uncorrected requires ignoring most of the evidence in the record, and specifically, that the toepath was known to employer to be inaccessible in the area along the track where employee was struck and killed by the northbound train, and thus required the decedent to "foul the track" in order to proceed in a northerly direction to undertake the assigned fence inspection work. This lack of visibility also prevented decedent from viewing the track in both directions to see if a train was coming.[8] This hazard had been reported, was

[8] The evidence showed employer's procedure for Simple Approval required notice to OCC was to be used only when "fouling the track" was not required by the wayside worker, and when employees could protect themselves by using the "15 second rule" which is:"Before fouling the track, (workers) need to plan where personnel can move to a previously determined location(s), clear of track, trains, and on-rail equipment, at least 15 seconds before an on-rail vehicle could reach that location." Due to the shrubbery obstructing the toepath, workers could not get to the toepath for much of the stretch of track depicted in the record. In some locations, a person could stand in the bushes on the toepath. Even in these locations, the bushes obstructed the worker's view of the track, thus removing whatever protection the 15 second rule may provide against being struck by on-track vehicles. Sufficient evidence exists in the record to support the conclusion that the decedent was either in the bushes, hidden from view of the train operator, and that he stepped out of the bushes when the train approached his location, and was thus struck by the front corner of the train, or that he was unable to get to the toepath and was walking northward along the edge of the shrubbery, hidden from the operators view, but within the pathway of the oncoming train. These are the only reasonable inferences to draw from the evidence of the physical features of the work location, the impact evident on the front side of the train, and decedent's severe blunt trauma injuries and resultant death.

the kind that the procedures manual indicated should be inspected and corrected, but was not corrected as required by section 3203(a)(6). We uphold the finding that this section was violated.

Employer also asserts the record does not support the serious classification of the section 3203(a)(6) violation. We disagree. The record contains substantial evidence of a serious, accident-related[9] classification, and also contains sufficient evidence to sustain a willful classification. A serious classification is appropriate when, assuming an accident occurs as a result of this violation, there is a substantial probability that the resulting harm will be death or serious bodily injury, which has been defined as permanent loss or disfigurement, or in-patient hospitalization for more than 24 hours for treatment rather than just observation. (*Abatti Farms Produce*, Cal/OSHA App. 81-0256, Decision After reconsideration (Oct. 5, 1985).) Here, Employer's failure to remove the shrubbery hazard after being made aware that it obstructs both the driver's view and the on-foot worker's view of each other, and in fact removes the toepath as a safe location for wayside workers, results in workers being exposed to the hazard of on-track vehicles. An employee being struck by a train moving 70 miles per hour, which resulted in death, is the accident we assume would happen when there is no safe walking area for workers who must walk alongside, or on, the active tracks. The serious classification is thus established.

Moreover, employer knew of the condition due to multiple reports by workers[10], and failed to implement any corrective plan or measures. It simply left the overgrown oleander in place, and assigned workers to be on foot in the location where there was no safe place to walk. This evidence is sufficient to establish the willful classification as that standard has been applied *in Rick's Electric, Inc. v. Occupational Safety and Health Appeals Board* (2000) 80 Cal. App. 4th 1023, 1035-1037 [willful classification sustained on a showing employer was cognizant of a hazardous condition, but did nothing to correct it].)

It is also clear from the record that this serious violation caused a serious injury, as Mr. Strickland's death resulted from the impassible state of the toepath, which removed any safe track-side location for this wayside worker at and around the 18.3 mile marker. Citation 2 has not been amended to reflect the evidence in this regard, and we decline to change the citation without notice to the Employer of such a proposition, to afford it the opportunity to show any prejudice may result from such amendment. (§ 386.)

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[9] The Division moved prior to hearing to amend the citations to allege that citations 3 and 4 were also accident-related. This request was granted. The Division did not move to amend Citation 2 to show it is accident related, though the record contains evidence to support this conclusion.

[10] At the time of the citation, Labor code section 6432 applied and contained an affirmative defense that if an employer neither knew nor could have known of the violation, the serious classification could be overcome. Here it is clear employer knew of the state of the overgrown shrubbery.

On remand, the ALJ may consider whether an amendment to the citation for accident-relatedness is appropriate as well.

3. The record contains sufficient evidence of the violation and the serious, accident related classification alleged in Citation 3.

Both Employer and the Division raise issues regarding Citation 3. Employer argues section 3273(b) does not apply to the toepath adjacent to the track because that section limits its application to walkways in yards. The ALJ rejected this interpretation of the Safety Order, and we do as well for the same reasons. The Division asserts error occurred when the ALJ declined to uphold the Serious classification. We agree that the record supports the serious, accident related classification of citation 3, and reverses the ALJ regarding the penalty calculation in this regard.

Citation 3 alleges a violation of section 3273(b) which is a General Industry Safety Order. Such orders "establish minimum standards and apply to all employments and places of employment in California." (§ 3202). Section 3273(b) states: "Permanent roadways, walkways, and material storage areas in yards shall be maintained free of dangerous depressions, obstructions, and debris."

The Division alleged the overgrown oleanders that obstructed the toepath alongside the western track at and around mile post 18.3 evidence a walkway not maintained free of dangerous obstruction. The evidence established these allegations. Employer argues the safety order only applies to walkways *in yards* due to the phrase "in yards" which follows the term "material storage areas", another type of work location that must also be free of obstructions listed in this safety order. Employer argues "in yards" modifies all places referred to in the safety order, i.e. permanent roadways and walkways, and material storage areas. This argument is contrary to general principles of statutory construction, and *Carmona* v. *Division of Industrial Safety* (1975) 13 Cal. 3d 303, and thus is not compelling.

Were we to construe the safety order to be limited to only in-yard permanent roadways and walkways, in addition to material storage areas, we would be significantly limiting the scope of the safety order to only work locations in yards. Our directive, however, is to construe safety orders to be more protective of workers when interpretation is given. (*Carmona, supra.*) Thus, we, like the ALJ, conclude the term "in yards" modifies only the term "material storage areas," and not the other workplaces listed in the safety order, namely "permanent roadways" and "walkways".

Principles of statutory construction also militate toward limiting the phrase "in yards" to modifying only the term "material storage areas". "[A] limiting clause is to be confined to the last antecedent, unless the context or the evident meaning of the statute require a different construction." *Elbert Ltd.*

v. Gross (1953) 41 Cal. 2d 322, 326-327; See, also, *County of Los Angeles v. Graves* (1930) 210 Cal. 21 26; *Hopkins* v. *Anderson* (1933) 218 Cal. 62, 65; *Anderson* v. *State Farm Mut. Aut. Ins. Co.* (1969) 270 Cal.App.2d 346, 349.) Were the modifying phrase offset by a comma, reading it as modifying the other items in addition to its antecedent would be appropriate. (Southerland Statutory Construction, 7th Ed, §47:33.) Without convincing indication from the remainder of the regulatory action to infer otherwise, it is proper to limit the modifying phrase to its immediate antecedent. (*Board of Trustees v. Judge* (1975) 50 Cal. App.3d 920, 927-928.) The ALJ read section 3273(b) consistently with these principles of statutory construction, and we conclude doing so was correct.

Employer also argues another safety order, section 3272(c), applies to walkways in general, and so is the correct safety order to have cited. However, Employer has not shown that it has complied with the requirement of this allegedly more applicable safety order.[11] (See *Stacey and Witbeck, Inc.*, Cal/OSHA App. 05-1142 Decision After Reconsideration (May 12, 2012)[valid defense to GISO fall protection citation by employer showing construction industry safety order applied and allowed unprotected work at the work elevation involved, rendering the employer in compliance with the applicable safety order]; *Gal Concrete Construction Co.*, Cal/OSHA App. 91-271, Decision After reconsideration (Feb. 28, 1992).) "When an employer has failed to comply with the safety order it asserts is more particular or appropriate, it cannot argue the inappropriateness of the cited safety order as a defense." (*Sheedy Drayage, supra*, citing *California Erectors, Bay Area, Inc*, Cal/OSHA App. 84-1254, Decision After Reconsideration (Sep. 30, 1986) and *Pacific Gas & Electric Co.*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).) Employer's assertion that section 3272(c) is more applicable does not provide a defense because Employer has not demonstrated compliance with that proffered provision.

Regarding the classification of Citation 3, the ALJ determined the Division failed to establish the alleged Serious classification. The Division moved to amend the classification to add that the serious violation was accident related. We conclude the evidence in the record establishes the violation was serious, and that it caused a serious injury, thus sustaining the accident-related charge. There is also sufficient evidence in the record that Employer was aware of the violative condition and failed to take any steps to remedy the condition before assigning employee Strickland to work on the inaccessible walkway.

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[11] Section 3272(c): "Permanent aisles, ladders, stairways and walkways shall be kept reasonably clear and in good repair." Here, the evidence shows the toepath was completely obstructed by oleander bushes, thus not "reasonably clear" or in any way allowing for workers to use it to walk.

As discussed above regarding Citation 2, a serious classification is established with proof that, assuming an accident occurs as a result of the violation, there is a substantially probability that that serious injury or death will result. (Labor Code section 6432 (2009).)[12] When determining whether the probability of serious injury is substantial, the injury that occurred may be considered, as must be the specific circumstances of the violation. (*R. Wright & Associates* , Cal/OSHA App. 95-3650, Decision After Reconsideration (Nov. 29, 1999).) Here, by removing the safety zone through failure to maintain the track-side walkway, or toepath, free from obstructions, Employer removed the employee's ability to avoid an on-coming train. We conclude the probability of death or serious injury from allowing the only safe wayside pedestrian area to remain obstructed and thus difficult or impossible to use is substantial. The hypothetical scenarios in the decision about maintaining walkways to avoid tripping hazards, which might not result in serious injury, are not evidence that rebuts the serious nature of the assumed injury here, which was shown to be death from being struck by a train due to lack of a safe trackside walking or standing area.

The decision applies the following rule: "The Division must present evidence to support an allegation that a violation is properly classified as 'serious.' Testimony offered by a Division investigator may be accepted as sufficient to support the allegation, if the investigator testifies to sufficient experience and observation of incidents similar in nature of the incident at issue in appending case, and if his testimony supports his conclusions." The decision cites *Davis Brothers Framing Inc*, Cal/OSHA App. 05-634, Decision After Reconsideration (Apr. 8, 2010) and *Webcor Builders*, Cal/OSHA App. 06-3031 as authority for this rule.[13] However, the Labor Code requires only that assumed accidents resulting from the violation yield serious injuries. Evidence of the accident that actually happened can provide the evidence that the violation, under the circumstances shown, would likely yield serious injury. The statute does not require, in addition to the circumstances of the actual fatality, statistical evidence of the results of similar incidences.

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[12]"a) As used in this part, a "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury:(1) A serious exposure exceeding an established permissible exposure limit.(2) The existence of one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment.(b) Notwithstanding subdivision (a), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.(c) As used in this section, "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation." (Labor Code § 6432, in effect on the date of the violation.)

[13] *Webcor Builders, Inc.*, Cal/OSHA App. 06-3031, Denial of Petition for Reconsideration (Jan. 22, 2010) found the proof required to establish a serious classification was met when the Division witness stated that all 50 of the 14 foot falls he investigated resulted in serious injury.

The amount and kind of evidence needed to establish a serious violation varies depending on the circumstances of a violation, and the Board has acknowledged this reality. (*California Family Fitness*, Cal/OSHA App. 03-0096 Decision After Reconsideration (Mar. 20, 2009).)[14] When no injury has occurred, and the consequences of the violation are beyond the knowledge of ordinary citizens, then additional evidence is appropriately required to establish a serious violation. This case is not such a case, and so we reverse the requirement for the unnecessary additional statistical evidence.

In *General Truss Co.*, Cal/OSHA App. 06-0782 Decision After Reconsideration (Nov. 15, 2011), the Board reaffirmed that accidents must be assumed, and rejected as irrelevant the argument that the hazard had been encountered many times without injury and thus the violation cannot be serious. Likewise, hypothetical potential mild injuries are not relevant to determining whether a serious injury is likely to result from an accident caused by a violation. Actual injuries, mild and serious, that have occurred would be relevant. However, lack of evidence of prior accidents does not require a finding of non-serious injury. That is, the first violation can be a serious violation. And, due to the vast variety of work situations in California, it is also too burdensome to require a statistically significant number of similar injuries to be presented to an ALJ before a serious violation can be upheld.

Rather, the rules of evidence sufficiently address what must be shown to prove whether there is a substantial probability of serious harm resulting from accidents and injuries caused by the violation. If the consequences are sufficiently within the common experience of the trier of fact, such as here, the actual accident that occurred is sufficient evidence of the likely severity of accident injuries resulting from the violation. (See Evidence Code § 801(a) [expert opinion limited to those matters sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.])

There have been cases where the potential severity of assumed accident injuries is beyond the common experience of the trier of fact, such as the probable effects of exposure to chemicals. (*Findly Chemical Disposal*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).) In such cases, an employer may challenge the opinion of the likely severity of

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[14] "The degree of evidentiary support needed to uphold a serious classification varies in Board precedent, because each case differs and presents different evidence, all of which must be evaluated on its own merits. Nonetheless, the Board has repeatedly held that opinions regarding the probability of serious injury must be supported by reasonably specific scientific or experienced based rationale, or generally accepted empirical evidence. E.g., *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 02, 2007); *MV Transportation, Inc., supra; R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999); see also, *Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006)." (*California Family Fitness, supra.*)

accident injuries by objecting to Division witness testimony and cross examining the witness regarding his or her foundational basis for rendering an opinion. (Evid. Code § 802.) Under the Evidence Code the party against whom the evidence is offered must make such objections. (Evidence Code § 720.) In civil trials, the court can regulate the course of the proceedings if it feels the opinion evidence offered is misleading to the jury due to a lack of foundation. (*People v. Watson* (2008) 43 Cal. 4th 652.) Opinion evidence is not automatically rejected if the party against whom it is offered fails to object. (*People v. Lewis* (2006) 43 Cal. 4th 415, 661-662.) However, Board precedent inserts this automatic objection on to the Division's evidence *sua sponte*, which is contrary to both the Labor Code and the Evidence Code, and we reject the analysis in *Architectural Glass & Aluminum*, Cal/OSHA App. 01-5031, Decision After Reconsideration (Mar. 22, 2004) that misconstrues the Evidence Code in this manner.[15]

We may not reject the testimony of the Division witness which is plausible, consistent with lay person understanding of the effects of failing to maintain the walkway alongside a train track which causes the on-foot workers to enter the path of the unseen, on-coming train, and which was not cross examined or challenged by Employer during the hearing.

Moreover, in light of the stipulation of the parties that "there is a substantial probability of serious injury if a BART train traveling at least 50 miles per hour were to strike an employee", the Serious classification has been established. Stipulations that are not contrary to law or public policy, that are relevant to the proceedings, bind the parties who enter into them. (*Jaguar Farm Labor Contracting Inc.*, Cal/OSHA App. 09-1136 Denial of Petition for Reconsideration (Oct. 6, 2010).) Stipulations are binding on the Appeals Board unless contrary to law or policy, and can have the effect of removing factual and legal issues from the consideration of the Appeals Board. (*Kinder Morgan*

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[15] The following expresses an incorrect application of Evidence Code § 800 et seq: "In its petition, the Division argues that "... Mr. Brooks' testimony that it was more likely than not that death or serious injury would be sustained went unchallenged by any objection to lack of foundation, cross-examination, or request for voir dire ... no one could seriously contend that a fall of 25 feet would likely result in an injury of a lesser nature." The fact that Brooks' testimony went unchallenged by Employer is of no significance because the burden is the Division's to show by a preponderance of the evidence each *element* of the violation and *substantial probability* is an element of a serious violation. It may very well be that a fall to the ground of 25 feet could more likely than not result in serious injury, however, no other evidence was offered that could lead the Board to that conclusion and the Board has no evidence as to the actual conditions at the time of the violation. To find, as the Division suggests, that no one could seriously contend that a fall to the ground of 25 feet would not result in serious injury would be tantamount to taking official notice [FN8] of an element of the violation for which the Division bears the burden. [FN9]" (*Architectural Glass, supra.*) Neither footnote provides support for the assertions referred to. Rather, longstanding authority reaches the exact opposite conclusion allowing the unchallenged opinion of the Division witness on the ultimate issue to provide sufficient evidence of a necessary fact that cannot be rejected without the reliability of the statement being shown to be highly questionable. (*People v. Turner* (1983) 145 Cal.App.3d 658, 671 [absent physical impossibility or inherent improbability, testimony of a single witness is sufficient to support criminal conviction]; see also 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 89, p. 123.)

Energy Partners, L.P., Cal/OSHA App. 05-2013 Decision After Reconsideration (Oct. 28, 2011).)

Here, the Division bore the burden of proof to show that, assuming an accident as a result of the violation under the circumstances here, there is a substantial probability of serious injury or death. The circumstances shown were that the path was so obstructed that track side workers could not use the track at certain points along its length. Without the clear path, wayside workers had to enter the track pathway (i.e. "foul the track") to proceed along the tracks on foot. The accident we assume would occur as a result of entering the train's pathway is being struck by a train. (*Benicia Foundry and Iron Works,* Cal/OSHA App. 00-2980 Decision After Reconsideration (Apr. 24, 2003)[division may assume a "worst-case scenario" in assuming accidents that result from violations].)

Since failing to maintain a walkway that, in this circumstance, ran alongside a railcar track, removed the only safe pedestrian area for track-side workers, and as a result, a worker was killed when struck by a train, such evidence shows the probability of serious injury from the unmaintained walkway was substantial. Although no one witnessed the accident, had the shrubbery been removed so as to maintain the toepath in a useable state, employee Strickland would not have had to "foul the track" in order to proceed northward to perform his fence inspection duties. For this reason, the serious violation caused a serious injury, and the accident related component of the classification has been established.

4. The record supports the denial of Employer's appeal of Citation 4.

Employer contests the portion of the Decision upholding Citation 4, and the serious accident related classification thereof. We find no error in the Decision in this regard, and affirm the violation, as well as the serious, accident related components of the classification. We also find sufficient evidence in the record to sustain a willful classification, and direct the ALJ on remand to consider whether amendment of the citation under Rule 386 is appropriate.

The Decision finds BART's failure to implement effective controls was established by the use of the inadequate "Simple Approval" procedure which failed to account for the impossibility of the deceased worker's use of that procedure to maintain his safety due to the physical layout of the workplace. The safety order allegedly violated was section 3332(b) which states: "Controls to safeguard personnel during railcar movement shall be instituted."

The Decision correctly analyzes the scope and application of the safety order, as well as the evidence presented that established a violation of the safety order. That is, we agree the "Simple Approval" in use by BART for many

years was not a "control" that "safeguard[ed] personnel during railcar movement." In its petition for reconsideration, Bart argues 30 years of use of the Simple Approval establishes its efficacy. However, good luck and alert employees throughout that time also account for the alleged, though not established, accident-free use of the procedure.

Moreover, we cannot accept that a procedure that specifically states "NO PROTECTION IS PROVIDED WITH A SIMPLE APPROVAL," per Employer's own manual, can safeguard personnel during railcar movement. (Original capitalization.) The very terms of the procedure state it does not provide any protection to employees. Employer contends wayside workers may properly be made responsible for their own safety, and that the 15 second rule is sufficient to allow workers to watch out for themselves. The plan thus does not account for track-side situations where the 15-second rule cannot be used due to the overgrown bushes obscuring the visibility of the worker attempting to use the walkway adjacent to the tracks. Thus, controls to safeguard personnel during railcar movement did not exist for the way side worker navigating an obstructed and impassable toepath. Employer cannot leave it up to the employee to safeguard himself. (*Kenai Drilling Limited*, Cal/OSHA App. 00-2326 Decision After reconsideration (Sep. 23, 2002); See *HB Parkco Construction*, Cal/OSHA App. 07-1731 Decision After Reconsideration (Mar. 26, 2012) [employer's rule that on-foot workers were to avoid earth-moving equipment was ineffective in fulfilling employer's duty to implement procedures to keep operators informed of worker's location as placing responsibility for safety on workers does not satisfy employers responsibility to provide a safe workplace.]

Employer asserts the safety order was not intended to apply to track areas, but instead to apply to the other locations identified within Article 7 (§§ 3332 through 3336). Employer asserts such identified places, though not included in 3332, act as indicators of regulatory intent that the entire Article is limited to those specified locales. While effectuating legislative or regulatory intent is the goal of statutory construction, we are first mindful of the requirement to apply the plain language of the safety order, and to refrain from reading terms in to or out of the safety order. (*E.L. Yeager Construction Company, Inc.* Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) Were the cited section ambiguous, then we could look to indicia of regulatory intent to resolve such ambiguity. However, we are also obligated to construe safety orders in ways more protective of workers when construction or interpretation is appropriate. (See *Carmona, supra.*) Here, the safety order lacks ambiguity, and simply states controls "during railcar movement" are required. Railcars move on tracks. We cannot restrict the application of the safety order to certain kind of tracks and limited types of railcar movement when no restriction is in any way suggested by the text of the regulation. The

Decision correctly evaluates the scope and meaning of the safety order as applicable to the circumstances here.

Last, Employer asserts another safety order applies to its operations, specifically the High Voltage Electric Safety Orders (HVESOs). Petitioner attempts to fault the Division for not citing these orders, which are asserted to apply to BART, and instead citing 3332(b). If the HVESOs apply to Employer, and are shown to be more specific to the hazard cited, Employer can avoid a citation by showing that the more specific safety order replaces the more general safety order, and that Employer has complied with that more specific safety order. (*Stacy & Witbeck, supra*.) Here, though, several shortcomings appear in Employer's argument. First, none of the allegedly more specific safety orders conflict with 3332(b), which is essential for the cited safety order to be inapplicable. Second, employer must have complied with that more specific safety order. (*Stacey & Witbeck*, *supra*.)

Employer cites section 2706(a), exception no. 2 for the rule that Article 36 of the HVESOs apply to BART. We agree that Article applies. The first section in that Article is section 2940, which states: "Safe Access: All work locations shall be safely accessible whenever work is to be performed."[16] There is no conflict between the HVESOs and the GISO cited, as both require safe trackside work locations be provided by an Employer. Employer attempts to fault the Division for "ignoring" other applicable safety orders falling within Article 36 of the HVESOs, specifically section 2945, which states the section is applicable to electrical railways. We agree section 2945 is applicable, but such does not give rise to a defense. Industry-specific special safety orders supplement the GISOs for situations unique to the work covered, and can replace a GISO if in conflict with a GISO. (*Stacy & Witbeck*, *supra*.) Employer articulates no conflict between the cited GISO, 3332(b), and any portion of Article 36 of the HVESOs.[17] We see none either.

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[16] Section 2706(a)[exception No. 2] is asserted as the more applicable section. It reads; "These High-Voltage electrical safety Orders, (sic) apply to all electrical installations and electrical equipment operating or intended to operate on systems of more than 600 volts between conductors and to all work performed directly on or in proximity to such electrical installations, equipment or systems in all places of employment in California as defined in Labor Code Section 6303. These orders do not apply to: (2) installations of conductors, equipment, and associated enclosures subject to the jurisdiction of the California Public Utilities Commission, that are owned, operated, and maintained by an electric, communication or electric railway utility. EXCEPTION: article 36, Work and Operating Procedures; and Article 38, Line Clearance Tree Trimming Operations apply to all work performed by electric utilities and electric railways.

[17] Section 2944, offered by Employer as demonstrating a conflicting safety order, specifically limits its application to work being done on or near high voltage conductors. Decedent here was assigned to inspect structures, and was not called on to work on or near such conductors. The evidence does not show he was assigned to work on or near high voltage conductors. As part of this defense, Employer must show this covered activity was occurring so as to show this safety order applies. Employer failed to provide such proof. As a structures inspector, decedent was forced to walk near the train, which has electrically charged paddles extending from both sides with which it contacts the third rail. Decedent was struck by the front corner of the train, and was killed by the blunt trauma. He was not struck by the electrical component of the train, or shown to have suffered injury from contacting electricity.

We uphold the Decision insofar as it finds violations of safety orders alleged in citations 2, 3 and 4. We affirm the serious, accident related classifications of citations 2 and 4. We reverse the ALJ regarding the classification of citation 3, and find the record supports the classification of serious, as alleged. And we further remand the matter to hearing operations to determine whether the classification of citations 2 and 4 should be amended to willful, or other appropriate classification, as authorized by Rule 386. Last, we order the ALJ who receives this matter to consider whether penalty reduction may be appropriate under the principles set forth in *A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010) [when a single abatement is required for multiple violations, multiple penalties are inappropriate].

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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