BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: K H S & S of CONCORD, INC. 1 Quality Drive Vacaville, CA 95688 Employer	Docket. 11-R2D2-0374 **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 Fred Stroh ("Employee") under submission, renders the following decision after reconsideration.

JURISDICTION

On August 27, 2010, Employee was injured at a worksite of K H S & S of Concord, Inc. ("Employer"). Employee fell off a roof onto a concrete landing. As a result, the Division of Occupational Safety and Health ("Division") inspected Employer's worksite.

On January 14, 2011, the Division issued two citations (three items) to Employer for violating workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1] Citation 1, Item 1 alleged a general violation of section 1671.2(a)(1) [failure to post signs warning of controlled access zone]. Citation 1, Item 2 alleged a general violation of section 1671.2(b)(1) [failure to designate competent person to monitor safety]. Citation 2 alleged a serious violation of section 1670(a) [failure to ensure fall arrest system worn by employees].

On February 3, 2011, the Division, represented by David Becker, and the Employer, represented by Paul Sanders, held an informal conference.

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

On March 4, 2011, Employee filed a motion for party status. The Board granted the motion on June 1, 2011.

In January 2012, the Board provided Notice to all Parties that a pre-hearing conference would be held on April 16, 2012.

On April 12, 2012, the Division and Employer agreed to settle this matter. Supporting documents state that the settlement agreement was based on the informal conference that took place between the Division and the Employer on February 3, 2011, new information provided by the Employer, and further review of the inspection records. The Division and Employer agreed upon the following settlement terms:

- The Division and Employer agreed to the violation contained in Citation 1, Item 1, which alleged a general violation of section 1671.2(a)(1) [failure to post signs warning unauthorized people not enter controlled access zone], but they modified the penalty from $560.00 to $450.00;
- The Division agreed that it would withdraw Citation 1, Item 2, which alleged a general violation of section 1671.2(b)(1) [failure to designate competent person to monitor the safety of other employees];
- The Division and Employer agreed to the violation contained in Citation 2, which alleged a violation of section 1670(a) [failure to ensure fall arrest system worn by employees], but they reclassified it from serious to general and modified the penalty from $8435.00 to $7,000.00.
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The settlement agreement was communicated to the ALJ on April 12, 2012. Employee did not participate in the settlement discussions.

On April 24, 2012, the ALJ issued an Order resolving the matter based on the terms contained in the settlement agreement, as discussed above.

On May 21, 2012[2], Employee prepared a Petition for Reconsideration. Employee challenged the April 24, 2012 Order on the basis that he had been granted party status, but was not invited (or provided the opportunity) to participate in settlement discussions. The Petition for Reconsideration was served on other parties in a timely manner, but it was not served on the Board. The Board did not receive the petition until June 20, 2012.

[2] The proof of service indicates it was not served until May 21, 2012, although the petition is dated May 19, 2012.

However, on July 12, 2012, before any action could be taken on Employee's Petition for Reconsideration, the ALJ rescinded her Order dated April 24, 2012 on the grounds that the Order had not been properly served on all Parties in compliance with section 355.

After the ALJ rescinded her Order, Employee moved to withdraw his Petition for Reconsideration. On August 8, 2012, the Board granted Employee's request to withdraw the Petition for Reconsideration.

In September 2012, the Board provided notice to all Parties that a pre-hearing conference would be held on December 17, 2012.

On December 17, 2012, a pre-hearing conference was held, which was attended by Employee. At the hearing, Employee was allowed to question the terms of any settlement and participate in settlement discussions. Michael Miller represented the Division at this conference. Following the settlement conference, the Division and Employer agree to settle this matter based upon the terms of their original settlement agreement, as reflected above.

On December 19, 2012, the ALJ issued an Order resolving the matter based on the settlement agreement reached between the Division and Employer. The settlement terms were identical to those reached in the April 24, 2012 order, discussed above.

Employee did not agree with the terms of the settlement. Employee filed a timely, Petition for Reconsideration challenging the Division's withdrawal of Citation 1, Item 2, which alleged a general violation of section 1671.2(b)(1) [failure to designate competent person to monitor the safety of other employees][3]. Employee contends that to withdraw the citation, the Division would have to conclude a safety monitor was present, but no such person was identified by the Division. And, Employee states that the Division's representative at the pre-hearing conference, Michael Miller, was ill informed regarding the facts of this matter.

The Division Answered the Petition.

ISSUES

1) **Was It Appropriate for the Division to Agree To Withdraw Citation 1, Item 2 Via Settlement?**

[3] The petition only challenges the ALJ's Order with regard to Citation 1, Item 2. The petition specifically states, "My petition for reconsideration is directed at Docket # 11-R2D2-0374 citation 1 item 2 1671.2(b)(1) [failure to designate a person to monitor the safety of other employees in a controlled access zone]."

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire record in this proceeding.

The purpose of the Occupational Safety and Health Act of 1973 ("Act") is to assure safe and healthful working conditions for all California men and women. (Labor Code section 6300.) "To achieve this goal, the Act envisions that employees have an opportunity to fully participate in the process so that their knowledge of the facts and unique perspective may be considered." (*Baldwin Contracting Company, Inc.,* Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001); *see also*, *Dey Laboratories, Inc.,* Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995); Labor Code section 6603.)

An "affected employee," meaning an employee exposed to the hazard described in the citation, may move to participate as a party to a proceeding. (Sections 347(b), 354(b).) "Proceedings" means any adjudicatory action begun by the filing of an appeal and includes a hearing, prehearing conference, petition for costs, reconsideration, or any other act that may result in an order or decision of the Appeals Board. (Section 347(w); *see also*, *Dey Laboratories, Inc.,* Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995).) "The action of parties in reaching a proposed settlement of an appeal results in an order of the Board either granting or denying that settlement." (*Dey Laboratories, Inc.,* Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995).)

"While not expressly stated, the Act thus reflects the Legislature's concern that employees be given the opportunity to participate throughout the entire process—from the initial inspection through the appeal proceedings—and this includes settlement discussions between the Division and the Employer." (*Dey Laboratories, Inc.,* Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995).) An employee given party status is entitled to provide "input into settlement discussions." (*Ibid.*)

But, where the Employee is provided an opportunity to participate and provide input into settlement discussions, the Board has long thought that injured employees and/or their representatives may not by objection prevent the acceptance of a settlement between the Division and Employer if good cause[4] for the settlement is found. (*Westech Industries, Inc.,* Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012), *citing,*

[4] "The Board regularly accepts as good cause the Division's conclusion that its original proposed penalty warrants adjustment as it does an employer's desire to avoid expending the resources needed to pursue an appeal..." (*Northern California Paper Recyclers, Inc.,* Cal/OSHA App. 09-2351, Denial of Petition for Reconsideration (Jun. 1, 2010).)

California State Department of Forestry, Cal/OSHA App. 85-1378, Decision After Reconsideration (Aug. 28, 1986).)

The legitimate interests in employees being heard in an appeal must be balanced against the well-settled principle that the Division has prosecutorial discretion in the conduct of proceedings before the Board. This includes the right to settle if, in its judgment, such a settlement is justified. (*Alco Iron & Metal Company,* Cal/OSHA App. 04-4270, Denial of Petition for Reconsideration (Feb. 23, 2007), *see also*, *UPS,* Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009).) As noted in *Westech Industries, Inc.,* Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012):

> The Board's function is to serve as a neutral arbiter and provide for a hearing on appeal, not to make prosecutorial decisions regarding enforcement, which is the Division's function. (Lab. Code § 6602 [Board hears appeals]; §§ 60.5(a), 6308, 6317 [Division enforces Occupational Safety and Health Act].) The principle of judicial non-interference with prosecutorial discretion is well-established. (*People v. Birks* (1998) 19 Cal.4th 108, 134-135.) Interfering with a voluntary settlement or decision to withdraw a citation would discourage such settlements in the future, and thereby "unduly hamp[er] the enforcement of the Act." (*Cuyahoga Valley Ry. Co. v. United Transportation Union* (1985) 474 U.S. 3, 7 (*per curiam*).) Even if the evidence is susceptible to various interpretations or may give rise to differing inferences, the Division has the sole authority to decide whether or not to issue and pursue enforcement of citations. (Labor Code § 6317.)

Generally, provided employees granted party status are given an opportunity to participate in settlement discussions and be heard, the Board will not interfere with a settlement agreement reached between the Division and Employer absent evidence of fraud or misrepresentation, or other grounds to void the agreement, such as a violation of Board Regulations or Public Policy. (*Westech Industries, Inc.,* Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012); *Northern California Paper Recyclers, Inc.,* Cal/OSHA App. 09-2351, Denial of Petition for Reconsideration (Jun. 1, 2010))[5].

[5] With only rare exception, the Board has denied petitions for reconsideration filed by affected employees to challenge a settlement agreed to by the Division and an employer. (*Northern California Paper Recyclers, Inc.,* Cal/OSHA App. 09-2351, Denial of Petition for Reconsideration (Jun. 1, 2010), *citing UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009); *Alco Iron & Metal Co.*, Cal/OSHA App. 04-4270, Denial of Petition for Reconsideration (Feb. 23, 2007); *Foster Turkey Products*, Cal/OSHA App. 00-2303, Decision After Reconsideration (Apr. 18, 2002); *San Diego Union Tribune, Union Tribune Publishing Co.*, Cal/OSHA App. 90-841-X, Denial of Petition for Reconsideration (Jul. 9, 1991); *California State Dept. of Forestry*, Cal/OSHA App. 85-1378, Order Granting Party Status and Denying Petition for Reconsideration (Aug. 28, 1986).) "The cases acknowledge the importance of affording employees an opportunity to be heard, but conclude that the ultimate decision regarding settlement

In the immediate case, it is undisputed that the Employee was granted the opportunity to fully participate in the pre-hearing conference that took place on December 17, 2012, prior to the ALJ's final dispositional Order. Employee's Petition reveals that, while at the conference, he was permitted, and availed himself, of the opportunity to participate in settlement discussions. Employee was provided the opportunity to speak directly to the Division's representative concerning the Division's decision to dismiss Citation 1, Item 2. Employee also had the opportunity to present objections to the settlement.[6] Since Employee had the opportunity to provide input into settlement discussions, we will not interfere with the agreement between the Division and Employer, absent evidence of fraud, misrepresentation, or other cause to void the agreement

Here, Employee offers no evidence of fraud or misrepresentation, nor is there any other evidence of misconduct to warrant setting aside the agreement. The gravamen of Employee's Petition for Reconsideration is that Michael Miller ("Miller"), the Division's representative at the pre-hearing conference, "was not familiar with the case at all." The Summary Table Order, attached to ALJ's December 19, 2012 Order, states that the Division agreed to withdraw Citation 1, Item 2 based on new information provided by the Employer. Employee states, while at the conference, "I asked Mr. Miller what the new information from the employer was that allowed for reductions and withdrawals of citations. He could not give me an explanation." However, Employee's arguments are not persuasive.

We note that Employee's Petition actually indicates that Mr. Miller did provide him some information in support of the Division's decision to dismiss Citation 1, Item 2. Within his Petition, Employee states:

> To vacate this citation there would have to be a safety monitor in the vicinity. Who was this monitor and where was he positioned? **Mr. Miller mentioned 3 names from Dave Becker's "vague" notes. (Emphasis added.)**

Thus, the Petition suggests that the Division did provide Employee some information, allowing Employee to participate in settlement discussions.

While Employee may disagree with the significance the Division assigned to this information, and while Employee may believe that none of these persons were specifically identified as a safety monitor, we do not find sufficient grounds to void the Division's decision to dismiss this citation. There is no

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belongs to the Division." (*Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009).)

[6] The ALJ's Prehearing Outcome sheet specifically notes "3rd party questioned terms of settlement and reason for reclassification from Serious to General."

evidence of fraud or misrepresentation; nor is there evidence of a violation of Board Regulations, Public Policy, or any other grounds to void the agreement. (*See, Westech Industries, Inc.,* Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012); *Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009).) If the Division, in evaluating the strengths and weaknesses of its case in view of its investigation and other information available to it, determines that it has insufficient evidence to prevail at hearing (despite a party employee's protests to the contrary), we will not upset that decision. It is the Division's function to make prosecutorial decisions regarding enforcement, and we will not interfere with that prosecutorial discretion except in rare circumstances not present here.

We also note that Miller's alleged lack of knowledge surrounding the reasons for the dismissal of Citation 1, Item 2 is not fatal to the settlement because the Division had been represented by more than one person during settlement discussions. The record reveals that David Becker represented the Division during the informal settlement conference dated February 3, 2011, which acted as the precursor to the Division's decision to dismiss Citation 1, Item 2. We infer that Becker was provided the additional information leading to the Division's decision to dismiss the citation, not Miller. We will not ascribe a fraudulent intent to the Division simply because Miller was not aware of all information provided to Becker, and Becker's notes were vague or difficult for Miller to decipher. Thus, Employee has not shown fraud, misrepresentation, or other grounds to void the settlement agreement or the ALJ's Order.

For the reasons above, we uphold the Order of the ALJ. We additionally note that the outcome would be the same, for the reasons discussed above, even if Employee challenged the other portions of the settlement agreement.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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