

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MOORE'S PUMPKIN PATCH AND
CHRISTMAS TREES
612 El Pintado Road
Danville, CA 94526

Employer

Docket No. 15-R1D4-1504

**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 Moore's Pumpkin Patch and Christmas Trees (Employer).

JURISDICTION

Commencing on October 28, 2014 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On January 14, 2015 the Division issued a citation to Employer alleging a willful violation of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On June 27, 2016 the ALJ issued a Decision (Decision) which upheld the citation and imposed a civil penalty on Employer.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

FINDINGS OF FACT

Employer operated an amusement ride called the “Sandstorm” in California in October, 2014.

Employer was required to have a permit to operate the Sandstorm.

Employer did not have the required permit.

Employer was told by the Division inspector that it needed to obtain a permit to operate the Sandstorm on October 17, 2014.

When the Division inspector returned to the worksite on October 28, 2014 the Sandstorm had been operating.

Employer had not obtained a permit to operate the Sandstorm on or before October 28, 2014.

ISSUE

Does the evidence show the violation to have been willful?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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.

Employer’s petition asserts that the ALJ acted in excess of powers, the evidence does not justify the findings of fact, that Employer has

discovered new evidence, and that the findings of fact do not support the Decision².

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 Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

We begin by noting that Employer did not dispute the existence of the violation, but rather only its classification as willful. (Decision, p. 3.)

Employer was cited for operating an amusement ride without a permit as required by section 3915, subdivision (b). The Decision found that when the Division inspected the amusement ride in question, the “Sandstorm,” on October 17, 2014, Employer did not have the required permit. The Division inspector informed Employer he needed to get an engineering evaluation done, since the Sandstorm had apparently not been operated in California previously, and to obtain a permit to operate it. (We infer that the engineering evaluation was a necessary precursor to obtaining the operating permit.) On October 17 the inspector also inspected two other amusement rides Employer was operating at the site and affixed registration stickers to all three amusement rides.

The inspector returned to the site on October 28, 2014, and found that the Sandstorm had been operating. In addition, Employer’s employee admitted to the inspector on October 28th that ride had been operating (which admission was confirmed in the employee’s declaration Employer included as part of the instant petition for reconsideration.)

At the hearing Employer disputed the inspector’s testimony. The ALJ made an explicit finding that the inspector’s testimony was more credible than Employer’s and explained the basis for that determination. We find no reason in the record to disagree with that finding. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575 [to get deference, credibility findings must be supported by reasons for them].)

In view of the finding that the inspector had told Employer it needed to obtain a permit to operate the Sandstorm, the further finding that it was operated without that permit establishes the violation as willful under section 334, subdivision (e), as explained next.

² Employer’s petition does not explain what new evidence it has discovered or why such evidence could not have been presented at the hearing. Its contention in that respect is therefore not considered (Lab Code § 6618.)

Section 334, subdivision (e) defines a willful violation as follows:
Willful Violation is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

The foregoing definition establishes two alternative tests for determining whether a violation is willful: the employer intentionally violates a safety rule, or an employer with actual knowledge of an unsafe condition makes no attempt to correct it. (See *Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034.) Because Employer was told that a permit to operate the Sandstorm was required and that it chose to operate the ride without obtaining the permit, at least the first alternative test is satisfied. Employer was on notice that a permit was required, and “intentional[ly] and knowing[ly]” operated the Sandstorm without it. And, in light of Employer’s having been told that the ride had to be evaluated from an engineering perspective, it is further reasonable to conclude Employer had knowledge of an unsafe (or potentially unsafe) condition and chose to take no step to correct it.

Employer claims in its petition that the registration stickers were placed in obscure locations on the rides and he did not examine them. He also contends he did not know he needed a permit to operate the Sandstorm, that the inspector did not make it clear that he was required to do so. We do not see how the failure to examine the stickers can benefit Employer, and do not credit his claim that he did not know of the permit requirement.

Finally, Employer’s petition also contends the penalty is excessive. To the contrary, the Decision imposed the statutory minimum for a willful violation, \$5,000. (Labor Code section 6429, subdivision (a).) Imposition of the minimum penalty, however, does not prevent the Division and Employer from agreeing to a payment plan, should they come to an agreement on the terms of such.

DECISION

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: September 12, 2016