

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**PAR ELECTRICAL CONTRACTORS, INC.
4770 N Belleview Avenue, Suite 210, Suite 300
Kansas City, MO 64113**

Employer

Inspection No.

1437436

**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 the California Division of Occupational Safety and Health (Division).

JURISDICTION

The Division issued three citations to PAR Electrical Contractors, Inc. (Employer) alleging a total of six violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Employer timely initiated appeals of the citations.

Administrative proceedings followed, including a contested evidentiary hearing before an administrative law judge (ALJ) of the Board. On August 31, 2022, the ALJ issued a decision (Decision). The Decision affirmed Citation 1, Items 1, 2 and 3. The Decision also vacated Citation 1, Item 4, which alleged a General violation of section 3203, subdivision (a)(5) [requiring timely submission of accident investigation report]; Citation 2, which alleged a Serious violation of section 3203, subdivision (a)(7) [employee training]; and Citation 3, which alleged a Serious, violation of section 3384, subdivision (b) [hand protection]. These latter three alleged violations are the subject of the Division's timely petition for reconsideration.

ISSUES

Did the ALJ err in holding that late submission of Employer's accident investigation report was not a violation of the applicable safety order?

Did the ALJ correctly vacate Citation 2, alleging the injured employee was not properly trained?

Did the ALJ correctly vacate Citation 3, alleging a hand protection violation?

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

**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.

The Division contends that the Decision was issued in excess of the ALJ's authority and the findings of fact do not support the Decision.

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.

BACKGROUND

We incorporate the findings of fact in the Decision here by reference. For convenience, we briefly summarize them.

The citations in question arose from an accident at Employer's workplace in California. One of its employees suffered a serious injury when the disc grinder he was using to trim metal kicked up and severed a portion of his thumb. After the accident, Employer conducted an investigation of the event the same day. No written report was made at that time documenting the investigation. The injured employee had worked for Employer for a number of years, had been trained on the use of the grinder, and had used it or similar tools daily for years.

DISCUSSION

We note at the start of our discussion and analysis that the Division has the burden to prove alleged violations by a preponderance of the evidence. (*Olam West Coast, Inc., dba Olam Spices and Vegetable Ingredients*, Cal/OSHA App. 1334740, Decision After Reconsideration (Feb. 17, 2022), citing *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) We examine each of the citations at issue individually below. Citation 1, Item 4.

This citation alleged a General violation of section 3203, subdivision (a)(5), which requires an employer's IIPP to, "Include a procedure to investigate occupational injury or occupational illness." Employer was cited because it "belatedly provided a copy of its accident investigation to the Division." (Petition, p. 2.) It is not disputed that the accident investigation report was conducted and ultimately submitted to the Division as requested; the timing is the issue.

When issued, Citation 1, Item 4 alleged that Employer had failed to properly implement the accident investigation procedures in its IIPP because it had not provided the report to the Division. It was later given to the Division and the Decision noted that the Division's witness testified that had Employer submitted the report when requested, "they would have been in compliance with [the safety order][.]" (Petition, p. 6, quoting testimony; same testimony paraphrased in Decision.)

The Petition argues that the tardy submission of the report compromised the Division's ability to fully and timely cite Employer. In view of the Division's issuance of the citations, its failure to move to amend the citations after receipt of the report, and its admission that the report complied with section 3203, subdivision (a)(5) when submitted, we reject that argument.

Section 3203, subdivision (a)(5) does not require an investigation report be prepared or state when such a report must be submitted to the Division, but merely that the employer's IIPP must "Include a provision to investigate [an injury or illness]." Here, Employer's IIPP did require production of a record of findings and corrective action taken, and, consistent with subdivision (a)(5), does not specify a time for doing so. The ALJ pointed out that a timely investigation was conducted, a report prepared, and provided to the Division. (Decision, p. 11.) Since neither the safety order nor Employer's IIPP set a time within which a report must be prepared, the Division's arguments about timing are not textually supported. And, the Board does not read language into safety orders. (*Electrical Systems and Instrumentations, Inc.*, Cal/OSHA App. 316695469, DAR, p.10 (Sep. 22, 2017).)

Citation 2

The one Item in this citation alleged a Serious violation of section 3203, subdivision (a)(7), for failure to train the injured employee on use of the grinder involved in the accident.

Section 3203, subdivision (a)(7) states that an employer's IIPP must:

Provide training and instruction

- (A) When the program is first established;
- (B) To all new employees;
- (C) To all employees given new job assignments for which training has not previously been received;
- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
- (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

[Exception to subdivision (A) omitted as not relevant here.]

The Decision parses the requirements of subdivision (a)(7) in the context of the evidence adduced at hearing concerning the training and experience of the injured employee and others. (Decision, pp. 12-14.) The ALJ concluded that the Division failed to meet its burden of proof and vacated the citation. (*Id.*, p. 14.)

The Division contends in its Petition that Employer failed to document the training and keep records of the training as required in section 3203, subdivision (b)(2). But, that is not the allegation in Citation 2, which alleged a failure to train, under subdivision (a)(7), as opposed to a failure to provide or keep records of such training, under subdivision (b)(2). Moreover, while subdivision (b)(2) requires training records or documentation to be kept for one year, the evidence established that the injured employee had been trained on using the grinder more than one year prior to the accident. The Board has held that training records are not required to be kept for longer than one year. (*Clark Pacific Precast, LLC, et al.*, Cal/OSHA App. 08-0027, Denial of Petition for Reconsideration (July 26, 2010).) Accordingly, we agree with the ALJ that no violation of section 3203, subdivision (a)(7), was shown.

Citation 3

Citation 3 alleged a Serious violation of section 3384, subdivision (b), which provides: “Hand protection, such as gloves, shall not be worn where there is a danger of the hand protection becoming entangled in moving machinery or materials.”

The Petition argues that the Decision ignores the language of the safety order. (Petition, p. 12.) To the contrary, the Decision both considers the language of section 3385, subdivision (b) and makes careful note of the evidence that the gloves the injured employee was wearing were tight fitting “and did not, and likely could not, become entangled.” (Decision, p. 16.) The ALJ’s discussion and analysis includes reference to the injured employee’s own uncontradicted testimony that the gloves were tight fitting and did not become entangled in the grinder. (Decision, pp. 14-16.) Further, the Decision notes that there is a balance to be struck in the present circumstances. Section 3384, subdivision (a) requires hand protection be used when the work involved creates exposure to “thermal burns,” as is the case when using the grinder to cut or shape metal. That requirement, combined with the uncontroverted evidence that the gloves did not present an entanglement hazard and that the accident was not caused by entanglement of the glove with the grinder, show that the Decision correctly vacated Citation 3.

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ’s Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Judith S. Freyman, Board Member

/s/ Marvin P. Kropke, Board Member

FILED ON: 11/09/2022

