

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

J. F. SHEA CONSTRUCTION, INC.
18256 La Sierra Avenue
Riverside, CA 92503

Employer

Docket No. 02-R5D3-801

**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 in the above entitled matter by J. F. Shea Construction, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between December 19, 2001 and January 3, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 18256 La Sierra Avenue, Riverside, California (the site).

On January 6, 2002, the Division issued to Employer a citation, alleging a serious violation of section 5291[b] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹

Employer filed a timely appeal contesting the existence and classification of the alleged violation and the reasonableness of the proposed civil penalty.

On September 25, 2003, a hearing was held before an Administrative Law Judge (ALJ) for the Board, and the matter was submitted that day.

The ALJ issued his Decision on February 26, 2004. The ALJ held that a violation was established, but that the Division did not prove the violation was serious, as alleged. The Division thereafter filed a timely petition for reconsideration contending that a serious violation was shown. Employer filed an Answer contending the Decision was correct.

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

EVIDENCE

Employer was cited for an alleged serious violation of section 5291(b) [blasts fired without warning signal/procedure].² Seven workers were outside a tunnel in the vicinity of its portal when a blast was fired, and alleged they were not given the required signal before the detonation. After investigating, the Division issued the subject citation.

Employer was engaged in digging or “driving” a tunnel as part of the Lake Mathews Secondary Outlet Project.³ Blasting was a routine part of driving the tunnel, which would be approximately 600 feet long when completed. The blast at issue was 170 feet inside the tunnel at its then end point or “face.”

The tunnel was a horizontal bore with one terminus at the bottom of a 110 foot deep conical excavation. The excavation was wider at the top than the bottom, and at several levels as it went deeper was benched or tiered, similar to an inverted wedding cake. The men were standing on the tier or bench above the portal of the tunnel, about ten feet above its roof and at about a 3:30 o'clock position if the portal is considered 12 o'clock when facing it.

ISSUES

Whether there was a violation of section 5291(b), and, if so, whether the violation was correctly classified as general by the ALJ.

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The citation alleged the men were not at a safe distance and “did not hear” a warning signal. At the time the citation was issued, the safety order stated:

Blasts are not to be fired without a positive signal and definite assurance that all surplus explosives are in a safe place, and all persons are at a safe distance or under sufficient cover.⁴

The evidence showed that standard blasting practice was followed in this instance. Among other elements not pertinent here, standard practice was to issue warning signals at five minutes and one minute before the blast. The person designated the tunnel “walker” is the last person out of a tunnel before a blast and is responsible for making sure that others are in safe locations.

² When issued the citation cited 8540(b). That section was renumbered before the hearing in this matter to 5291(b), which the ALJ used throughout. We adopt that numbering as well.

³ This was a project for the Los Angeles Metropolitan Water District.

⁴ The quoted language was in effect when the citation issued, codified as section 8540(b). At present, section 5921(b) states, “Blasts are not to be fired without a warning signal/ procedure and until definite assurance that all surplus explosives . . .”

The walker in this case was Mr. Jim Autry. The person who detonated the blast was required to wait until Autry was out of the tunnel, and did so. There was testimony that Autry signaled the blaster that everything was clear.

The evidence showed that the person who detonated the blast waited until the men in the excavation were visible to him and were on the bench above the tunnel. The evidence also showed that the men in the excavation correctly interpreted some unspecified behavior by the person detonating the blast as indicating he was going to “fire the shot.” They took cover behind piled construction material on the bench.

There was also testimony by some of the men in the excavation that they were surprised by the blast, that they thought it was premature, and they were angry that they had not been given more time to get further from the tunnel.

The Decision noted that the evidence was in conflict regarding whether the required signal had been given. The men in the excavation denied hearing a signal, although the “blaster in charge” who fired the blast claimed he had given it, and a witness for Employer testified that he had received the signal. The Decision said, “[T]he balance of the evidence therefore indicates that no one on the ledge . . . heard a positive warning that the blast was going to be set off.” It went on to find “that Employer was in violation of §5291(b) at the time of the explosion because the employees on the ledge did not receive a positive signal[.]...”

The ALJ, however, held the Division had not proved the violation was serious because it failed to show that the men on the ledge were not at a safe distance from the blast. The only evidence in support of that claim was a dented metal clip board. The Division attempted to show the dent was caused by “fly rock” (debris) from the blast. However, the men on the ledge neither saw nor felt any fly rock. And Employer’s witnesses testified that had fly rock traveled that far (i.e., the entire length of the tunnel and then some distance to the clip board) it would also have encountered and damaged equipment in the tunnel itself, whereas no such damage occurred. Further, the ALJ noted that the blast debris extended about 28 feet from the blast point within the tunnel, and then held, “[I]t is difficult to accept that fly rock left the tunnel [by flying another 140 feet or so beyond the debris pile] and traveled 150 feet [further, beyond the portal] to a clip board without injuring anything else.” Accordingly, the ALJ held the Division had failed to establish that the seven men were exposed to a substantial probability of death or serious physical harm, as required by Labor Code section 6432.

We now review the ALJ’s findings, first considering whether there was a violation of the safety order.

The men in the excavation said they did not hear any warning signals. On the other hand, there was uncontroverted testimony by Employer’s witness

that signals were given by horn at five minutes and one minute before the blast was detonated, and that contemporaneous radio announcements were also made.⁵

It is reasonable to believe both statements are correct. The signals may not have been heard by the men in the excavation because they were in the tunnel where the sound and radio signal did not reach or were not heard due to ambient noise conditions (as to the five-minute signal) and because they were standing close to a large ventilation fan on the “bench” of the excavation above the tunnel opening when the one minute warning was sounded. The detonation occurred soon after the men were out of the tunnel and on the bench.

Although the ALJ used the words in his decision, the safety order does not require the signal be “receive[d]” or “heard.” In pertinent part the safety order states, “Blasts are not to be fired without a positive signal [being given.]”

Requiring that a signal be *heard* reads a term into the safety order, which the Board has held it may not do. The Appeals Board has held that its function is “to interpret[] and apply[] the safety orders adopted by the Standards Board. [The Appeals Board] may not go beyond that function and ignore or revise the requirements of those orders.” *HFS Investments*, Cal/OSHA App. 96-3079, Decision After Reconsideration (June 6, 2001); *Superior Construction Inc.*, Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000); see, also, *Herman Weissker, Inc.*, Cal/OSHA App. 00-1462, Decision After Reconsideration (May 10, 2002) [“Nor are we inclined to rewrite the coverage provisions of the safety orders, which is within the sole authority of the Standards Board.”]. In *Mobil Oil Corp.*, Cal/OSHA App. 00-222, Decision After Reconsideration (Apr. 29, 2002), the Board stated: “The Board cannot impose stricter or more detailed requirements than those set in a safety order promulgated by the Standards Board.” Accord: *Hylton Drilling Co.*, Cal/OSHA App. 82-216, Decision After Reconsideration (Jan. 17, 1986); and *Lockheed Missiles and Space Co., Inc.*, Cal/OSHA App. 74-629, Decision After Reconsideration (Apr. 10, 1975) [“In interpreting a statute [or regulation], the judge may simply ascertain and declare what is expressed, not insert what may have been omitted. The Division’s interpretation is not binding upon the Appeals Board.”]

Viewing the safety order as requiring the *giving* of a signal does imply that the signal be of a type or nature reasonably calculated to reach the intended recipients. If the signal is not heard, the issue is whether it was given in a manner such that it was likely to be heard by those whom it was intended to warn. The evidence in this case was that the signals were given in the customary fashion by the customary means, horn blasts and announcements

⁵ The witness was the “Licensed Professional Engineer” who designed every “shot” (blast or detonation) for the project, who testified he heard the warnings on his radio before the blast.

on portable radios to persons in the area.⁶ The evidence further demonstrates that at least one person heard the warnings.

Given that the evidence shows the signals were given and received, albeit not by the men in the excavation, and that the signals were given in the manner customary, we find that the safety order was not violated, and accordingly reverse the holding of the ALJ in that regard and grant Employer's appeal. As there was no violation, the issue of whether the ALJ correctly classified it is moot.

DECISION AFTER RECONSIDERATION

The Board reverses the ALJ's Decision and the assessment of a \$300 civil penalty. Employer's appeal is granted.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 2, 2007

⁶ The evidence showed that the tunnel walker, the person in charge of clearing the blast area, was in possession of a radio, although he denied hearing a signal or broadcast warning of the pending detonation.