

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

In the Matter of the Appeal of:

KENNY-SHEA-TRAYLOR-  
FRONTIER/KEMPER, J.V.  
2155 East 7th Street, Suite 175  
Los Angeles, CA 90023

Employer

Docket No. 03-R5D2-0323

**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 Kenny-Shea-Traylor-Frontier/Kemper, J.V.'s (Employer) Petition for Reconsideration under submission, and after reviewing the entire record, renders the following decision after reconsideration.

**JURISDICTION**

Beginning November 22, 2002, a representative of the Division of Occupational Safety and Health (Division) conducted an accident investigation at a place of employment maintained by Employer at the intersection of Jefferson and La Cienega, Los Angeles, California.

On December 27, 2002, the Division cited Employer for an alleged serious violation of the occupational safety and health standards found in Title 8, California Code of Regulations section 4999(e)(2).<sup>1</sup> Employer filed a timely appeal contesting the alleged violation.

The appeal came on regularly for hearing on March 16, 2005 before an Administrative Law Judge (ALJ) for the Board, and the matter was submitted that day. The ALJ rendered the decision on April 13, 2005, upholding the alleged accident-related serious violation and assessing a civil penalty of \$18,000.

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<sup>1</sup> Section 4999 was amended after the Citation was issued to add a new subsection (a) and re-codify the pre-existing subsections accordingly, so that former section 4999(e)(2) is now section 4999(f)(2). There were no other changes. For clarity and consistency we retain the regulatory cite used in the Citation. Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

Employer filed a petition for reconsideration of the ALJ's decision. The Division filed an answer. The Board issued its Order taking the petition under submission on June 28, 2005.

### **EVIDENCE**

As noted, Employer was alleged to have violated section 4999(e)(2) for failing to prevent inadvertent contact with an obstruction during hoisting. Section 4999(e) reads:

(e) During Hoisting:

(1) There shall be no sudden acceleration or deceleration of the moving load.

(2) Inadvertent contact with obstructions shall be prevented.

The accident involved happened when three concrete tunnel liner segments, which weighed about 3,500 pounds each, were dislodged and struck one of Employer's employees, seriously injuring him. Before being dislodged, the segments were resting on a "segment car" at the bottom of a tunnel shaft.

The segments were dislodged when empty nylon slings attached to a load hook caught on a part of the segment car while a crane was raising the hook and attached slings after having deposited a load of materials in the tunnel. As the hook and slings continued to rise after catching on the segment car, the car shifted or tipped, and the three tunnel segments fell onto the employee.

The "shifter" or crew foreman in the tunnel who was flagging (i.e. signaling) the crane operator appears to have made a signaling error that led to the slings getting caught on the segment car and causing the accident.

### **SUBSEQUENT CASE**

After we took this matter under reconsideration in June 2005, we issued our decision in *Webcor Construction LP*, Cal/OSHA App. 07-5150, Denial of Petition for Reconsideration (Jun. 24, 2009). That decision held that the Safety Order Employer here was charged with violating is so vague as to be unenforceable.

### **ISSUE**

Whether the holding in *Webcor, supra*, that section 4999(e)(2) is unenforceably vague, applies to this proceeding.

**FINDINGS AND REASONS  
FOR  
DECISION AFTER RECONSIDERATION**

We have adopted the general rule holding judicial decisions are generally given retroactive effect. (*BLF, Inc.*, Cal/OSHA App. 02-4675, Decision After Reconsideration (Jan. 7, 2010), citing *Burris v. Superior Court* (2005) 34 Cal.4<sup>th</sup> 1012, 1023.) Further, we have long held that, “Changes in safety orders, or changes in their interpretation by the Appeals Board, more favorable to an employer cited before such changes became effective, are made retroactive by the Appeals Board.” (*Oberti Olive Company Division of Tri/Valley Growers*, Cal/OSHA App. 79-222, Decision After Reconsideration (Aug. 31, 1984).)

Applying that principle, we hold that our decision in *Webcor, supra*, that section 4999(e)(2) is so vague as to be unenforceable, applies in this proceeding. The same Safety Order has been charged, its terms were the same in both instances, and so it was equally vague when Employer was cited and when Webcor was cited.

**DECISION AFTER RECONSIDERATION**

The Board reverses the ALJ’s decision upholding the citation and imposing an \$18,000 civil penalty, and grants Employer’s appeal.

CANDICE A. TRAEGER, Chairwoman  
ART R. CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: JULY 12, 2010