

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

In the Matter of the Appeal of:

BOBERG ENGINEERING & CONTRACTING, INC.  
4218 E. La Palma Avenue  
Anaheim, CA 92807

Employer

Docket No. 06-R3D3-4964

**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 Boberg Engineering & Contracting, Inc. (Employer) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on June 6, 2006, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Chino, California maintained by Employer. On November 20, 2006, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1 (docket number 06-4963) alleged a Serious violation of section 1592(a) [scraper operated without functioning back-up alarm and without signaler]. Citation 2 (docket number 06-4964) alleged a Serious violation of section 1593(d) [failure to check back-up alarm before placing scraper in service].

Employer filed timely appeals of both citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on November 30, 2009. The Decision granted Employer's

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

appeal of Citation 1, but upheld Citation 2 and its Serious classification, imposing a civil penalty of \$4,950.

Employer timely filed a petition for reconsideration, which specified that it was seeking reconsideration of the ALJ's Decision insofar as it sustained the violation alleged in Citation 2. The Division filed an answer to the petition.

The Board took Employer's petition under submission by order of February 4, 2010.

As we will explain, we affirm the result of the Decision but reach that result on other grounds.

### **ISSUE**

Did Employer violate section 1593(d)?

### **EVIDENCE**

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer was a contractor at a large construction project in Chino, California. The work included grading streets prior to their being paved, which in turn required various earthmoving operations. Employer rented a John Deere scraper – a type of earthmoving equipment – and its operator, Steve Mock, from another firm, Edge Rental. It was stipulated by the parties that under this arrangement the operator was a leased employee, and a dual employment situation existed. Edge Rental was the primary employer, Boberg the secondary employer. As a secondary employer, Boberg was responsible both for and to Mock's actions on the job. (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App.4<sup>th</sup> 684, 693 [dual employment principles applied in occupational safety and health context].)

On June 5 and 6, 2006, the scraper was used at the Chino site. On June 6<sup>th</sup>, the scraper struck and killed another Boberg employee while it was backing up over a pile of dirt in order to get into a position from which to move forward and scrape up the dirt.

There was conflicting evidence about whether Mock checked the operation of the scraper's back up alarm before he began operating it on June 6, 2006, the day of the accident.<sup>2</sup> The Division's inspector testified that when he interviewed Mock after the accident Mock stated he had not checked whether the alarm worked. Mock testified that he did check it at the beginning

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<sup>2</sup> It was not seriously disputed that the alarm was not working at the time of the accident.

of the shift on the morning of June 6th, and further that he always did so both because it was his habit to do so as part of his checklist procedure and because if the alarm wasn't functioning he was not able to work until it was fixed. Mock further testified that when he was interviewed after the accident he was very upset, and was trying to say that he had not checked the alarm shortly before the accident. No other employee of Boberg checked the operation of the alarm on June 6th.

At the start of the hearing, the ALJ stated for the record stipulations which the parties had made. Among them was the statement, "[Boberg] acknowledges its obligation to check the scraper alarm." At hearing Employer's counsel did not object or seek to correct that statement. In its petition for reconsideration, however, Employer contends that it understood its stipulation to be a general acknowledgement that someone had to check the alarm for or on behalf of Boberg, and not that Boberg, through a member of its management, had the obligation to do so.

## **DECISION AFTER RECONSIDERATION**

### **Docket 06-R3D3-4964**

Citation 2, Item 1

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

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 petitioned for reconsideration on the basis of Labor Code section 6617(c) and (e).

The safety order which Employer was alleged to have violated, section 1593(d), states<sup>3</sup>:

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<sup>3</sup> We assume without deciding that section 1593(d) applies in this situation. As the Decision explained in granting Employer's appeal of Citation 1, the Division introduced no evidence to show that the scraper had a haulage capacity of 2.5 cubic yards or more. Since both section 1592 and 1593 apply to haulage

All vehicles in use shall be checked at the beginning of each shift to assure that the following parts, equipment, and accessories are in safe operating condition and free of apparent damage that could cause failure while in use: service brakes, including trailer brake connections; parking system (hand brake); emergency stopping system (brake); tires; horn; steering mechanism; coupling devices; seat belts; operation controls; and safety devices. All defects affecting safe operation shall be corrected before the vehicle is placed in service. These requirements also apply to equipment such as lights, reflectors, windshield wipers, defrosters, fire extinguishers, etc., where such equipment is necessary.

The Decision (pp. 8, 9) finds that no Boberg “manager” checked the back-up alarm, and that while Mock testified he did so before beginning work on June 6<sup>th</sup>, he was a “subcontractor of Boberg”. We note, however, that the quoted safety order does not specify who is required to make the various required checks. The word “manager” does not appear in section 1593(d). We may neither read terms into or out of a safety order. (*E. L. Yeager Construction Co., Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007); *Rick’s Electric v. Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4<sup>th</sup> 1023, 1033-1034 [agency cannot alter or enlarge legislation].) A member of Boberg’s management was not required to check or verify operation of the alarm given the language of the safety order. One of Boberg’s employees could fulfill the requirement. Therefore the ALJ erred in holding that Boberg could not delegate that responsibility and, “at a minimum, one of Boberg’s management personnel should have consulted with Mock” to verify he had checked the alarm. (Decision, p. 9.) And since Mock was an employee of both Edge Rental and Boberg given the existing dual employment circumstances, his checking the backup alarm would have satisfied the safety order. Thus, we must resolve the conflict in the evidence about whether he checked it at the beginning of his work shift on June 6<sup>th</sup>.

The Division’s inspector testified that during his interview of Mock at the accident scene, he asked whether Mock had checked the alarm that day. The inspector testified that Mock said he had not.

Mock also testified. As pertinent here he explained that when the inspector asked him about checking the alarm at the scene he was still very upset by the accident, and understood the inspector to be asking whether he, Mock, had checked the alarm immediately before the accident rather than earlier that morning before starting work with the scraper. Mock also testified that it was his standard practice and a requirement that he check the alarm’s functioning each day before starting work, and that he followed that practice on both June 5 and June 6, 2006.

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vehicle operations, it is not clear from the text of the two sections that the capacity requirement of section 1592 does not apply to vehicles covered by section 1593 as well.

We find Mock's statement to the inspector at the scene to be the more reliable. While it is understandable Mock was upset, his state of mind and the interview's proximity in time to the accident make it likely he had no time to alter his perception or recollection of events. His later testimony, while apparently sincere, was naturally subject to normal human psychological processes which can change one's recollection of events. Accordingly we give more weight and reliance to his raw and unrehearsed interview responses at the scene.

We rest our determination of the relative trustworthiness of the two competing statements on the same factors which are considered to render "spontaneous statements" trustworthy. (See Evid. Code § 1240.) "The theory of trustworthiness is predicated on the startling or exciting nature of the act observed and on the spontaneity of the statement made under the stress of excitement produced by the declarant's observation." (1 Jefferson's California Evidence Bench Book (Fourth Ed. 2009) § 13.3, p. 234.) The circumstances here meet the requirements for admission under the spontaneous statements exception to the hearsay evidence rule. The accident was an occurrence such as to produce nervous excitement (Mock testified he was upset when interviewed); the statement was made before there was time to contrive and misrepresent (again, Mock testified that at the time of the interview he was still upset due to the accident, which he had caused); and Mock's statement about checking the backup alarm related to the circumstances of the accident. (See *id.*, § 13.1, p. 234.) Based on the foregoing considerations, we think Mock's statement at the scene the more reliable.

Therefore, we affirm the result of Decision sustaining Citation 2 but for the different reasons stated above.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: September 6, 2013