

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BAY AREA RAPID TRANSIT DISTRICT
300 Lakeshore Drive, 18th Floor
Oakland, CA 94612

Employer

Dockets. 2010-R1D1-3056
through 3058

**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 the California Division of Occupational Safety and Health (Division)¹ under submission hereby renders the following decision after reconsideration.

JURISDICTION

Commencing on June 3, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by the Bay Area Rapid Transit District (BART or Employer).

On September 16, 2010, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.²

Employer timely appealed. After the appeal was filed Service Employees International Union Local 1021 moved for and was granted third-party status in the administrative proceeding. Also, Citation 1, which alleged a “Serious” violation of section 2940.6(a) [failure to provide insulating equipment] was resolved by agreement of the parties and is therefore no longer at issue.

The administrative proceedings which were held before an Administrative Law Judge (ALJ) of the Board included a contested evidentiary hearing.

¹ Third Party Service Employees International Union Local 1021 also filed a petition for reconsideration, which is addressed in a separate, contemporaneous Denial of Petition for Reconsideration.

² References are to California Code of Regulations, Title 8 unless specified otherwise.

On July 25, 2013, the ALJ issued her Decision (Decision) granting Employer's appeal of Citations 2 and 3.

The Division timely filed a petition for reconsideration. The Division contends the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

Employer filed an Answer to the petition.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration and Employer's answer. 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.

ISSUE

Whether the evidence established the two alleged violations.

EVIDENCE

To begin, we provide a brief recap of the background and explain some of the nomenclature which appears in the record.

BART is a public agency which operates a commuter heavy rail system in the San Francisco Bay Area. BART trains are powered by electricity and run on two rails (called running rails) while an electrified third rail parallel to the running rails and located to one side or the other³ provides the electricity used to power the trains. The third rail operates at a nominal 1,000 volts.

Employer had assigned a team of welders to perform welding on the "near" running rail during the early morning hours when the BART system is shut down for maintenance and power to the third rail is turned off. The near running rail is the one closer to the electric third rail at the work location.

The two citations at issue alleged violations of two "high-voltage electrical safety orders," because the third rail operates at a nominal 1,000 volts. Citation 2 alleged a Willful Serious violation of section 2940(c), which provides in pertinent that "Only qualified electrical workers ["QEWs"] shall work on energized conductors or equipment connected to energized high-voltage systems." Citation 3 alleged a Willful Serious violation of section 2944(c)(1), which states, "No person other than a qualified electrical worker shall perform

³ At any given location the third rail is either to the left or right side of the running rails. It does not appear that the third rail is between the two running rails. There may be locations where there is a third rail on both sides of the running rails for short distances to provide continuous power during a transition.

work or take any conducting object within the area where there is a hazard of contact with energized conductors unless directly under the observation of a qualified person.” The key term in both safety orders is “energized.” Although “energized” is not defined, *per se*, in the high voltage electrical safety orders (§ 2700 and following), section 2700 does contain a definition of the term “Energized Parts (Live Parts)” as “Parts which are of a potential different from that of the earth, or some conducting body which serves in place of the earth.” Although BART argued that the welders were QEWs and were working under each other’s direct observation, for purposes of our analysis below we assume without deciding that they were not QEWs.

During the time the welding work in question was being performed BART had turned off power to the third rail throughout the system. In addition, by means of computer commands from its central control location BART also opened three circuit breakers controlling electric power to the section of the third rail adjacent to the welding operation, thus further isolating the third rail from receiving power. The evidence was that the computer commands resulted in the circuit breakers physically opening the circuit so as to disconnect it from the power source.

The Division argues the evidence shows the Employer did not take the appropriate steps to de-energize the third rail, i.e. to ensure there was no electrical power running through the third rail. (Petition, p. 2.) We find two flaws in that characterization of the matter. First, under the terms of the safety order, the work is only prohibited when the third rail *was* energized while the welding was done, and the safety order is silent as to the process used by employer to achieve compliance. Second, the term “de-energized” does not appear in the cited safety orders. To the contrary, the question we must answer is whether the evidence preponderates in favor of a finding that the third rail was in fact energized at the time the welders worked. (See *Chamberlain v. Ventura County Civil Service Commission* (1977) 69 Cal.App.3d 362, 369, citing *People v. Miller* 171 Cal. 649, 652-653.)

The Division has the burden of proving each element of its case, including the applicability of each cited Safety Order, by a preponderance of the evidence. (See, e.g., *Travenol Laboratories, Hyland Division*, CAL/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980); *Howard J. White, Inc., Howard White Construction, Inc.*, CAL/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983); and *Cambro Manufacturing Co.*, CAL/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) The Division's burden includes proving that employees were exposed to the hazard addressed by the cited Safety Orders. (See, e.g., *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).)

The evidence here does not show the third rail was energized at the time of the work at issue; instead it shows the contrary. First, electric power to the third rail was turned off system-wide. Second, as an additional precaution, three circuit breakers which controlled the flow of electricity to the portion of the third rail at issue were also physically opened by remote command. That procedure further prevented power from flowing into the subject portion of the third rail, even if power to the overall system were to have been restored. The effect, in household terms, was analogous to both turning off electric power to one's home at the main (utility) connection – equivalent to the system-wide shut-off here – *and* opening the circuit breaker which controls an individual circuit in the house's circuit breaker panel before one works on that circuit. The contention that it was necessary to manually “rack out” – pull out – the three circuit breakers ignores the evidence that they were caused to open physically by the remote computer command. Continuing our household analogy, the argument, in effect, is that the circuit breaker was required to be physically removed, not just opened (put in the “off” position), for the work to be done.

The Division argues that the state of the third rail, as either energized or not, is not the relevant inquiry, but that the procedures contained in the definition of “de-energized” must be followed in order to comply with the cited safety orders. Indeed, the record reflects that Employer filed a variance application with the Standards Board seeking to perform the de-energizing process in a way different than that defined in section 2700. The Standards Board denied this request. We are respectful of that Board's expertise and authority. We assume for sake of discussion that the procedure proposed by Employer to that Board in its variance application was the one followed here. It may be, therefore, that the procedure followed by Employer in this case, and proposed to the Standards Board to be used in all cases, is neither the wisest, the safest, nor most appropriate.⁴ Nevertheless, in this case, the preponderance of the evidence is that it worked on the day in question.

Regarding the language of the safety orders, we observe that the term “de-energized,” though defined in section 2700, does not appear in either section 2940(c) or section 2944(c)(1), the cited safety orders.⁵ Thus, the argument focuses on a term not in the safety order. Reading a term into a safety order is not permitted (*E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007)), and the Decision correctly rejects the argument. The Division bases its argument on a term not found in either of the cited safety orders. It was not BART's burden to show that the third rail was “de-energized.” Rather it was the

⁴ The Standards Board may wish to promulgate a standard detailing the procedure(s) to be followed.

⁵ Of course, the Standards Board may choose to amend the safety order(s) at issue here to further promote worker protection.

Division's burden to prove the third rail *was* "energized," and the preponderance of the evidence shows it was not.

The Division also argues that no steps were taken to verify that the third rail, after it was powered off and the circuit breakers were opened, had an electric potential equal to that of the earth. The record contains evidence to the contrary. There was presented evidence that the welders used a probe to verify that the third rail had no voltage, i.e. no electric potential different from the earth or a conducting body serving in place of the earth. The third rail must be a conducting body in order to serve its purpose of transmitting electric energy from power sources to trains. If it had no measured voltage, its potential was equivalent to the earth's.

Another version of this argument maintained that the probe used by the welders lacked sufficient sensitivity and therefore might not have revealed that the third rail had some residual electric potential. We disagree. The evidence established that the power was off system-wide, and that further precaution was taken to isolate the third rail where the welding was being done from being re-energized. When the power is off, electric potential effectively drops to zero, and since the third rail is a body capable of and designed to conduct electricity, it is a conducting body serving in place of the earth. Thus, proof that "energized parts" were being worked on is not in the record.

It is also argued that welders were exposed to the hazard of working on or near an energized third rail, and that if the third rail were to be inadvertently energized harm could result. The preponderance of the evidence, however, showed that the third rail was not energized and would not be inadvertently energized. The concerns expressed by the workers, though understandable, were based on speculation, not evidence. The Decision correctly did not rely on them.

The Division also argues that the Occupational Safety and Health Standards Board's denial of a variance request (see Labor Code § 143) by BART resolves the question here as to how to whether the part being worked on was energized. We disagree.

First, the Standards Board appeared to presume the third rail was energized for purposes of the variance application. Here, we must determine whether, at the time the work was being done, the rail was "energized." Second, in the variance application proceeding, Employer had the burden of showing its proposed work process would be as safe or safer than the procedures required by the applicable standard(s), is the definition of "de-energized" in section 2700. The Standards Board found Employer did not meet this burden. We do not have this inquiry here. And, Division asserts the Standards Board defined the meaning of "energized" at issue here as "de-energized". While the intent of a regulatory body in enacting regulations, as

contained in the regulatory history, can assist in resolving any ambiguity in the language of the regulation, the Division has demonstrated no ambiguity in need of such resolution. “Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning.” (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.) We agree there is none. Moreover, the opinion of members of the body enacting legislation expressed after the passage of the measure may not be relied upon to determine the intent of the provision. (*Aguilar v. Superior Court (Cintas Corporation 2)* (2009) 170 Cal.App.4th 313, 326 (fn 7)). Although the Standards Board alone enacts regulation, the Appeals Board is charged with interpreting their meaning, and is not bound by a later statement of the meaning of a regulation. Here, the Standards Board has not even expressed an opinion, of any weight, as to the meaning of the sections cited here, and for this additional reason, we are not constrained to construe the term “energized” as requiring a process described in the term “de-energized”, a term the Standards Board elected not to include in the cited safety orders at issue here. (See *Chamberlain v. Ventura County Civil Service Commission* (1977) 69 Cal.App.3d 362, 369, citing *People v. Miller* 171 Cal. 649, 652-653.) Had the Standards Board intended to require the process described in the term “de-energize” to be used before working on any parts, it could have included the term “de-energized” in these sections. We decline to re-write the standard in this manner.

DECISION AFTER RECONSIDERATION

For the reasons stated above, we affirm the ALJ’s Decision.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JANUARY 31, 2014