

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BODEGA LATINA CORP dba EL SUPER
14601-B Lakewood Boulevard
Paramount, CA 90723

Employer

Dockets. 12-R3D6-2545 through 2547

**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 Bodega Latina Corp dba El Super (Employer).

JURISDICTION

The Division of Occupational Safety and Health (Division) conducted an inspection on February 10, 2012 at a jobsite in Covina, California maintained by Employer. On August 8, 2012, the Division issued three citations to Employer, alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1, Item 1 a serious accident related violation of section 3203(a) [failure to train employee on use of Hobart meat saw] and proposes a penalty of \$18,000. Item 2 alleges a serious violation of 4353(g) [failure to equip compaction equipment with locking system; employees not trained to operate baler] and proposes a penalty of \$6750. Item 3 is a serious accident related violation of 4543(b)(2) which alleges a violation of 4543(b)(2) [guard on Hobart meat saw not adjusted to table], and proposes a penalty of \$18,000.

Employer filed a timely appeal contesting the existence of the violations, classification and reasonableness of the proposed penalties. A hearing was held before an Administrative Law Judge (ALJ) on August 14, 2013. A decision was issued on November 4, 2013, affirming the three citations and upholding the penalties.

Employer timely filed a petition for reconsideration. Employer is seeking reconsideration of the ALJ's decision in citation 1 and citation 3.

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

The Division filed an answer to the petition.

ISSUE

Was the decision correct in sustaining the appealed citations?

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.

Employer has asked the Board for reconsideration of the ALJ's decision on the basis of (a), (c), (d) and (e).

In her decision, the ALJ found that the Division proved by a preponderance of the evidence that employee David Campos was not trained to use the Hobart meat saw. She also found that the guard to the Hobart saw was not adjusted near the table at the time of the accident, leading to Campos' finger being partially amputated. Although Employer reiterates in its petition that Campos did not have permission to use the meat cutter, the Board has found that "an employee injured while operating a machine... [is] an operator...even though he was not an "authorized operator." (*Metalclad Insulation Corp.*, Cal/OSHA App. 96-130, Decision After Reconsideration (Oct. 4, 2000).)" (*Rialto Concrete Products, Inc.* Cal/OSHA App. 96-R3D3-1217, Decision After Reconsideration (Apr. 30, 2002).) The Board also addressed this argument in *Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010), finding that "employee malfeasance," however characterized by the employer, is not a defense to a citation for an employee injury.

No defenses or affirmative defenses were raised by the Employer in its initial appeal to the citations which Employer now asks the Board to reconsider. Any issue not raised on appeal is deemed waived (Decision, p. 6-7, citing Board Rules of Practice and Procedure, Section 361.3, see also, *Western Paper Box Co.*, Cal/OSHA App., 86-812, Denial of Decision After Reconsideration (Dec. 24, 1986).).

Employer submits employee statements and a handbook acknowledgment sheet in support of its petition; these documents are apparently submitted as new evidence under Labor Code 6617(d). The statements are from employees who work at the supermarket where Campos was injured. Employer provides no explanation as to why these statements, or these individuals, could not be produced to testify at the hearing held on August 14, 2013. Where the employer could have learned of evidence with reasonable diligence in advance of hearing, the Board will decline to deem that evidence submitted with a petition to be “newly discovered.” (*Jerlane, Inc., dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration, Aug 20, 2007).)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JANUARY 28, 2014