BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: CA PRISON INDUSTRY AUTHORITY 1 Kings Way Avenal, CA 93204 Employer	Dockets. 08-R2D5-3426 through 3429 **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 California-Prison Industry Authority (Employer).

JURISDICTION

Commencing on March 27, 2008 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On August 7, 2008 the Division issued four citations to Employer alleging seven violations of occupational safety and health standards codified in California Code of Regulations, Title 8.[1]

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including four days of contested evidentiary hearings on December 9, 2010, May 3 and 4, 2011, and September 13, 2011. The ALJ who presided at those hearings retired from the Board and State service in December 2011 before issuing her decision. The matter was submitted to another Board ALJ for decision pursuant to Board regulation section 375.1(c).

On August 21, 2013, the ALJ issued a Decision (Decision) which upheld the violations alleged in Citation 1, Item 3 and Citation 2 and granted Employer's appeals of all other alleged violations.[2]

[1] References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration.

The Division filed an Answer to the petition.

ISSUES

Did the ALJ err in denying Employer's motion to dismiss for lack of jurisdiction and excluding Employer's expert witness testimony on the issue of jurisdiction?

Does the Division have jurisdiction to cite Employer without first conducting hearings or other procedures?

Did the ALJ act in excess of his powers by extending the time in which to issue the Decision?

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's petition asserts Labor Code section 6617(a), (c), (d), and (e) as grounds for reconsideration.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. 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.

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[2] The deciding ALJ also issued an "Amended Decision" on August 29, 2013, which related back to August 21, 2013.

The Board has considered Employer's jurisdictional arguments twice, and rejected them both times. (*California Prison Industry Authority*, Cal/OSHA App. 07-2171, Denial of Petition for Reconsideration (June 3, 2010); *California -- Prison Industry Authority*, Cal/OSHA App. 09-2459, Denial of Petition for Reconsideration (Oct. 26, 2011).)[3]

Employer contends the ALJ erred in denying its motion to dismiss on the grounds that the Division lacked jurisdiction to cite Employer. In light of our earlier decisions on this point, the question is *res judicata*.

The California courts have held that the principles of res judicata and collateral estoppel apply to administrative adjudications. (*People v. Sims* (1982) 32 C.3d 468; 7 Witkin *California Procedure* (4th Ed.) Judgment, section 339). Under these principles, an issue that was fully litigated by the parties, or by an entity in privity with a party, may not be litigated anew in a separate proceeding. (*French v. Rishell* (1953) 40 C.2d 477, 479.)

Three factors must exist before res judicata or collateral estoppel will bar an action: 1) the issue decided at the previous proceeding must be identical to the one sought to be litigated anew; 2) the previous proceeding must have resulted in a final judgment; and 3) the party against whom collateral estoppel is asserted must have been a party or in privity with a party to the prior proceeding. (*Sims, supra*.) In order for these principles to apply to an administrative decision, the adjudicatory administrative agency must be acting in its judicial capacity to resolve a disputed issue of fact that is properly before it and the parties must have been given a full and fair opportunity to litigate their claims. (*Sims, supra*; *Carmel Valley Fire Protection Dist. v. State of California, et al.* (1987) 190 Cal. App. 3d 521, 535.)

All four factors exist here. The identical issue was raised previously before this Board by Employer, the Division was the opposing party, and we, acting in our quasi-judicial capacity, rendered a decision now final.

1. Employer's jurisdictional arguments are addressed as follows. Labor Code section 6304.2 provides:

> "Notwithstanding [Labor Code] Section 6413, and except as provided in sections 6304.3 and 6304.4, any state prisoner engaged in correctional industry, as defined by the Department of Corrections, shall be deemed to be an "employee," and the Department of Corrections shall be deemed to be an "employer," with regard to such prisoners for the purposes of this part."

[3] On November 1, 2013, the Marin County superior court denied Employer's petition for writ of mandate in the latter matter. The court agreed with the Board's interpretation of the applicable statutes.

Given that a state prisoner engaged in correctional industry is an employee, and the Department of Corrections and Rehabilitation (as it is now named) is an employer, and that the Division "has the power, jurisdiction, and supervision over every employment and place of employment in this State[,]" the Division has jurisdiction over Employer. (Quotation from Labor Code section 6307.)

The Division's investigation in the instant matter was the result of an injury accident, not a complaint by an inmate regarding working conditions. The accident at issue caused a "serious injury" as defined in Labor Code section 6302(h). Further, Labor Code section 6313(a) requires the Division to "investigate the causes of any employment accident that is fatal to one or more employees or that results in a serious injury or illness[.]" The exceptions listed in Labor Code section 6303.2 do not apply under these circumstances.

The first exception refers to Labor Code section 6304.3, which requires each correctional industry facility to have a "Correctional Industry Safety Committee." Section 6304.3(a) further provides that the Division "shall promulgate, and the Department of Corrections shall implement, regulations concerning the duties and functions" of correctional industry safety committees at each facility maintaining a correctional industry. Section 6304.3(b) provides that complaints about working conditions in a correctional industry shall first be directed to the Correctional Industry Safety Committee, and section 6304.3(c) gives the Division discretion whether to inspect or investigate a facility of a correctional industry. Lastly, section 6304.3(d) allows the Division to provide advanced notice of an inspection if necessary for security reasons, which is normally not allowed. (See Labor Code § 6321.)

Thus, the provisions of Labor Code section 6304.3 do not apply in this instance, because the Division was investigating an accident which caused a serious injury to an employee, and did not arise from a complaint made to a Correctional Industry Safety Committee.

The other exception is Labor Code section 6304.4, which provides, "A prisoner engaged in correctional industry, as defined by the Department of Corrections, shall not be considered an employee for purposes of the provisions relating to appeal proceedings set forth in Chapter 7 (commencing with Section 6600)." The appeal proceedings provisions of Chapter 7 allow "employees" to contest the abatement period proposed in a citation (Labor Code sections 6601, 6601.5, and 6602) and further provide that "employees" be allowed to participate in appeal proceedings as parties. (Labor Code section 6603.) While section 6304.4 excludes inmate employees from those provisions, the exclusions are not applicable in the instant matter.

"It is a cardinal rule of statutory construction that parts of a statute must be construed together and harmonized as far as possible to avoid repugnancy." (*Brown v. Guy* (1959) 167 Cal.App.2d 211, 214; see *Sante Fe*

Mechanical Company, Inc., Cal/OSHA App. 94-2087, Decision After Reconsideration (Jun. 9, 1999) (fn 7).) Reading the plain language of the cited sections together, we conclude that the Division has jurisdiction over correctional industry facilities under the plain language of section 6304.2, (see *Panakosta Partners, LP v. Hammer Lane Management, LLC* (2011) Cal.App.4th [court examines statutory language giving it a plain and commonsense meaning].) Further, the exceptions to that language set forth in Labor Code sections 6304.3 and 6304.4 do not affect the Division's jurisdiction over Employer, but rather apply to specific aspects of the administration of the Act and appeals of citations which do not exist here.

Employer further argues that section 344.46 requires the Division to make recommendations and allow its committee to investigate the complaint and propose solutions before the Division may issue a citation to Employer. But section 344.46 does not apply here because there was no complaint, and section 344.46 does not mean what Employer contends it does.

First, section 344.46 is but one of several regulations, commencing with section 344.40, dealing with "correctional industries" operations and establishing complaint procedures inmates may use and requiring Employer to establish "committees" to address such complaints. (Sections 344.40 through 344.46.) Section 344.46 must be read in that context. (*County of Sacramento v State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, 1586) [hether interpreting statutes or regulations, the same principles are used]; *Panakosta, Partners, LP v. Hammer Lane Management, LLP* (2011) 199 Cal.App.4th 612, 628 citing *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737; rev. denied Jan. 4, 2012 [language of statute read in context of statutory framework as a whole].)

Under section 344.46 the Division may make recommendations, or may take other action as it deems appropriate. Specifically, subdivision (b) of section 344.46 states, in pertinent part: "If the Department of Corrections fails to comply with the recommendations described in subsection (a) above, or in any other case in which the Division deems the safety of any state prisoner shall require it, the Division may conduct hearings and after such hearings may adopt such special orders, rules, or regulations, or otherwise proceed as authorized in Chapter 1 (commencing with Section 6300 of Division 5 Part 1 of the Labor Code) as it deems necessary." We note that the foregoing provides that if the Division deems that safety of "any state prisoner" requires, it "may . . . otherwise proceed as authorized [by] . . . Section 6300 [and following] of the Labor Code. The referenced Labor Code provisions include those sections giving the Division enforcement authority over all places of employment in California, including Employer's operations. (Lab. Code § § 6307, 6304.2, *inter alia*.) In addition, to the extent section 344.46 conflicts with the Labor Code's provisions regarding the Division's enforcement authority, the Labor Code takes precedence. (*In re C.B.* (2010) 188 Cal.App.4th 1024, 1033, 1034 [in any conflict between statute and regulation the regulation must give way].)

2. Delay in Rendering Decision

This case was initially heard by ALJ French, who retired before issuing a decision. It was then reassigned to Presiding ALJ Fassler for decision. The parties stipulated that the record of the hearing conducted by Judge French would be used; they agreed that a rehearing was not needed.

It took some time for Fassler to review the record and issue a decision. Employer claims that the Board acted in excess of its powers in so delaying, and further that "[therefore] DOSH has failed to meet its burden to establish the applicability of the safety orders[.]"

First, the time limit for a decision in Labor Code section 6608 is directory, not mandatory. (*California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145; *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (June 8, 2007) [decision timely when issued within 30 days of extended submission date].) Second, given that the case was decided on the record as established by the hearing and proceedings conducted by Judge French, there is no logical connection between the timing of the Decision and whether the record shows DOSH met its burden of proof. And, since Employer's petition for reconsideration does not challenge the Decision insofar as it ruled on the citations, those arguments are waived. (Lab. Code § 6618; *Kaiser Foundation Hospitals v. California Occupational Safety and Health Appeals Bd.* (1984) 155 Cal.App.3d 282, 286, fn2.)

DECISION

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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