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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KEY ENERGY SERVICES, INC.,

Plaintiff and Appellant,

v.

CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD,

Defendant and Respondent;

DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,

Real Party in Interest and Respondent.

F073567

(Super. Ct. No. S-1500-CV283958)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Ogletree, Deakins, Nash, Smoak & Stewart, John F. Martin and Thomas B. Song for Plaintiff and Appellant.

J. Jeffrey Mojcher, Aaron R. Jackson, Autumn R. Gonzales and Andia Farzaneh for Defendant and Respondent.

Nathan D. Schmidt and Kathryn J. Woods for Real Party in Interest and Respondent.

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An employer appeals from the denial of its petition for a writ of mandate. The petition sought a writ directing the California Occupational Safety and Health Appeals Board (Board) to vacate its order upholding the citation issued against the employer by State of California Department of Industrial Relations, Division of Occupational Safety and Health (Division), for violation of a workplace safety regulation. In this appeal, the employer contends substantial evidence did not support the Board's finding that it violated the regulation. We conclude substantial evidence supports the finding of violation, and the trial court did not err in denying the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

On December 10, 2012, a five-man crew of employees of petitioner, Key Energy Services, Inc. (Key Energy), was working on an oil rig. Also present were two employees of another entity, Western Fishing Services. Norberto Gomez, a floorhand for Key Energy, was using tongs to unhook large sections of tubing that were being pulled out of the well hole. Because water or other liquid was coming out with the tubing, Gomez was using a wet box (also known as a mud bucket); he attached it to the connections between sections of tubing before unscrewing them, in order to direct the liquid downward and avoid getting the crew members wet. As Gomez worked, a sudden release of pressure from the well tubing caused a powerful blast; it blew the wet box upward and into a tree. After the blast, Gomez was found lying on the floor, with a head wound; he was hospitalized with a fractured skull.

The next day, Frank Dorado, Key Energy's senior safety advisor, reported the workplace accident by telephone to real party in interest, the Division. He reported to the Division's representative that, while Gomez was working on the oil well, he went to put the wet box on and there was a pressure release. The pressure release pushed the wet box, which struck Gomez's hard hat; Gomez was hospitalized and underwent surgery.

On December 12, 2012, the Division's associate safety engineer, Terry Hammer, began an inspection of the employer and the accident site. She met with Dorado and Allen Rice, Key Energy's head of corporate safety. Rice showed her the wet box involved in the accident, showed her a similar, undamaged wet box, and had her take photographs of both. He then took her to the oil rig and explained how the accident had occurred. He explained where on the wet box Gomez's hands were at the time of the accident. Rice also demonstrated where Gomez was standing as he installed the wet box on the tubing at the time of the accident. He showed Hammer the tree where the wet box landed.

The Division subsequently requested Key Energy's Form 300 log, which is a log in which employers are required to record work-related injuries. Key Energy provided its Form 300 logs for the years 2009 through 2012. In June 2013, the Division issued four citations to Key Energy, including a citation for failing to fully complete the Form 300 log entries. The Form 300 citation was based on the failure to include complete information in column F, identifying the "object/substance that directly injured or made person ill."

Key Energy appealed the citations and the matter was heard before an administrative law judge (ALJ). The ALJ issued a decision upholding the Form 300 citation for the December 10, 2012, entry and imposing a $450 penalty. Key Energy petitioned for reconsideration of the ruling on that citation by respondent, the Board. The Board reviewed the matter and issued a decision denying the petition for reconsideration.

Key Energy then petitioned the superior court for a writ of mandate directing the Board to vacate its decision on the citation in issue. The trial court denied the writ. Key Energy appeals that denial.[1]

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[1] The Division's December 8, 2016, request for judicial notice is granted. (Evid. Code, §§ 452, subd. (c), 459; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 484.)

DISCUSSION

I. Provisions of the Act

The California Occupational Safety and Health Act of 1973 (Lab. Code, § 6300 et seq.; Act) was "enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health." (*Id.*, § 6300.) The Division is charged with the responsibility for administering and enforcing the Act, and the safety standards promulgated pursuant to it. (Lab. Code, §§ 6302, subd. (d), 6307, 6308.) In carrying out its duties, the Division may inspect work sites, investigate complaints about workplaces, and investigate accidents in which workers have been injured. (*Id.*, §§ 6309, 6313, 6314.) It may cite an employer for violation of safety standards or regulations. (*Id.*, § 6317.)

An employer served with a citation may appeal it to the Board. (Lab. Code, §§ 6319, 6600.) The appeal may be heard by the Board or a hearing officer, which must issue a decision affirming, modifying or vacating the citation. (*Id.*, §§ 6602, 6604, 6608, 6609.) An aggrieved party may challenge the final decision by petitioning the Board for reconsideration. (*Id.*, § 6614.)

After the petition for reconsideration has been resolved, a party affected by the decision may seek review of the decision by petitioning the superior court for a writ of mandate. (Lab. Code, § 6627.) Review is limited to determining whether: "(a) The appeals board acted without or in excess of its powers. [¶] (b) The order or decision was procured by fraud. [¶] (c) The order or decision was unreasonable. [¶] (d) The order or decision was not supported by substantial evidence. [¶] (e) If findings of fact are made, such findings of fact support the order or decision under review." (*Id.*, § 6629.) In ruling on the petition, the trial court does not hold a trial de novo, take evidence, or exercise its

independent judgment on the evidence. (*Ibid*.) It reviews the record of the administrative decision to determine whether any of the grounds for appeal set out in Labor Code section 6629 exist. (*Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1033.) On appeal from the denial of the writ petition, our function is the same as that of the trial court: to review the Board's decision for error under Labor Code section 6629. (*Rick's Electric*, at p. 1033.)

II. Citation Proceedings

The citation in issue charged Key Energy with a violation of section 14300.29, subdivision (a), of Title 8 of the California Code of Regulations (hereafter, § 14300.29(a)), which provides, in pertinent part:

> "You must use Cal/OSHA 300, 300A, and 301 forms, or equivalent forms, for recordable injuries and illnesses. The Cal/OSHA Form 300 is called the Log of Work-Related Injuries and Illnesses . . . . Appendices A through C give samples of the Cal/OSHA forms. Appendices D through F provide elements for development of equivalent forms consistent with Section 14300.29(b)(4) requirements." (§ 14300.29(a).)

The citation stated: "On December 12, 2012, the Division initiated an inspection. The Division determined that the employer did not fully complete the OSHA Form 300 for calendar year 2010-2012. The employer used Form 300 and did not completely fill out column F."[2]

Columns B through E of Form 300 request the injured employee's name, job title, date of injury or onset of illness, and where the event occurred. The heading of column F states: "Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill. (e.g. Second degree burns on right forearm from acetylene torch)." For Gomez's injury, the entry in column F reads: "Fractured skull-Forehead."

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[2] There were no entries on the Form 300 for 2009. It stated: "No OSHA recordables for 2009."

A hearing before the ALJ was held on this citation and two others.[3] Witness testimony was taken and documents were admitted. The ALJ made findings of fact including the following: Gomez, an employee of Key Energy, was injured at the workplace on December 10, 2012.

> "3. On the day of the accident, workers were performing a 'fishing' operation in the well to remove a clog.
>
> "4. The accident happened when a sudden release of pressure from the well occurred, blowing the mud bucket skyward. [¶] . . . [¶]
>
> "8. In the December 10, 2012 entry on Form 300, Employer did not identify, in column F, the object or substance that injured the employee."

Regarding Key Energy's argument that the statute of limitations had run, precluding a citation for shortcomings in any of the entries in its Form 300 logs for the years 2010 through 2012, the ALJ found that the citation for the December 10, 2012, occurrence was timely, because the citation was issued within six months of the occurrence of the accident. (See Lab. Code, § 6317.) Implicitly, it found the Division had not timely cited Key Energy for violations concerning any prior entries recorded in its Form 300 logs.

The ALJ concluded: "On Employer's 2012 form 300, there was an entry indicating an injury to Norberto Gomez on December 10, 2012, but there was no entry in column F to indicate the 'object . . . that directly injured' Gomez. The factual allegation of the citation was accurate. This failure to insert information in column F for the Gomez injury was a violation of section 14300.29(a)." The ALJ rejected Key Energy's argument that it was only required by the regulation to "use" Form 300, not to fully complete it. "It would be pointless to require employers to *use* the form 300, but not require them to fill it out correctly and completely." The ALJ added: "Even if Employer were unsure as to

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3 The other two citations adjudicated are not at issue in this appeal. The fourth citation was withdrawn by the Division at the outset of the hearing.

what actually caused the injury on December 10, 2012, Employer could have recorded 'unknown' in column 'F.' " She noted the failure to include the cause of the injury did not appear to be due to uncertainty, because Key Energy had not completed column F to reflect the cause of injury for any of the entries in its Form 300 logs for 2010 through 2012.

Key Energy petitioned for reconsideration of the decision, arguing that section 14300.29(a) contained no language requiring employers to specify the object that directly injured the employee, and that imposing such a requirement based on the instructions in Form 300 added language to the regulation that it did not contain and constituted an invalid attempt to enforce an underground regulation. Key Energy contended section 14300.29(a) required only that the employer " 'must . . . use[]' " Form 300, and Key Energy "undisputedly" used that form. It also argued that, if it was required to follow the instructions on the form, it complied because it did not know what object, if any, struck Gomez and directly injured him.

The Board denied Key Energy's petition for reconsideration. It noted the grounds for review asserted by Key Energy were that the decision was issued in excess of the ALJ's powers, the evidence did not support the findings of fact, and the findings of fact did not support the decision.[4] After fully reviewing the record and the arguments presented in the petition for reconsideration, the Board found the ALJ's decision was supported by the evidence and appropriate under the circumstances. "The evidence shows that Employer did not fill in all the information called for by section 14300.29(a), specifically the information to be entered in Column F on the 'Form 300,' the identity of the object which caused the injury in question."

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[4] Grounds for reconsideration include: by the decision of the hearing officer, the Board acted without or in excess of its powers; the evidence does not justify the findings of fact; and the findings of fact do not support the decision. (Lab. Code, § 6617, subds. (a), (c), (e).)

The Board concluded the "you must use" language in section 14300.29(a) required the employer to fill in the information called for in the form; it noted Key Energy had not explained "how one 'must use' Form 300 and yet not be required to fill it in." The Board also rejected Key Energy's underground regulation argument, observing that the form was "included in the regulatory notice when section 14300.29 was promulgated, and therefore the content of the forms is a properly issued regulation."

Finally, the Board rejected Key Energy's argument that it did not enter information about the object causing injury because the only witness to the accident was Gomez, who could not remember what occurred. The Board stated: "Yet the record contains substantial evidence that the injured employee was struck by a piece of equipment on the well drilling rig called a 'mud bucket.' In view of that evidence, it is reasonable to require Employer to have included that information in the Form 300."

Key Energy sought review of this decision in the superior court by petition for writ of mandate. It contended the decision should be vacated on the ground it was in excess of the Board's powers, because the findings of fact were not supported by substantial evidence in the record and did not support the decision.[5] Key Energy focused on the

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[5] On petition for a writ of mandate to review the Board's decision:

> "The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:
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> "(a) The appeals board acted without or in excess of its powers.
>
> "(b) The order or decision was procured by fraud.
>
> "(c) The order or decision was unreasonable.
>
> "(d) The order or decision was not supported by substantial evidence.
>
> "(e) If findings of fact are made, such findings of fact support the order or decision under review.

Board's finding that there was " 'substantial evidence that the injured employee was struck by . . . a "mud bucket." ' " It complained that the Board failed to cite any specific evidence in support of that finding, despite statutory and regulatory requirements that the decision state the evidence relied upon. (Lab. Code, §6623; Cal Code Regs., tit. 8, § 385, subd. (a).) It argued the Division failed to introduce any evidence showing the wet box or any other object struck Gomez, so Key Energy was not required to describe any object as the object that injured Gomez, when it filled out Form 300.

The trial court denied Key Energy's writ petition. It agreed with the Board's interpretation of section 14300.29(a) as requiring the employer to provide the information requested in column F of Form 300. It also affirmed the Board's finding that Key Energy failed to comply with section 14300.29(a) when it failed to identify the object that caused Gomez's injury. The trial court concluded that finding was supported by substantial evidence. It stated the Board made a broad finding that Key Energy failed to properly complete the Form 300 entry by listing the object that injured Gomez; it also made a more specific finding that Key Energy failed to list the wet box as the object that injured him.

The trial court found that Dorado's accident report, which identified the wet box as the object that struck Gomez, constituted substantial evidence supporting the Board's findings. It rejected Key Energy's arguments that Dorado was not authorized to make such a representation on its behalf, and that Dorado had no personal knowledge of that fact because he was not present when the accident occurred; it stated that reaching a conclusion on those arguments "would require this Court to wade into the weighing-of-evidence-territory in which it is expressly forbidden" to go. The trial court deferred to the Board's findings of fact, stating that it could not "tell from the record why the . . .

> "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 6629.)

Board found the admission of Mr. Dorado more convincing [than] the competing evidence. To the contrary, this Court can determine that an admission by the Senior Safety Advisor on the very fact that is contested, is substantial. The Board could have found the statement an admission against interest and the Board could have drawn reasonable inferences from the facts of the accident and injury as well."

In this appeal, Key Energy does not challenge the Board's conclusion that section 14300.29(a) required it to fully complete the Form 300 log for Gomez's injury, including identifying in column F the object that directly injured Gomez. Key Energy challenges only the sufficiency of the evidence to support the finding that the wet box caused Gomez's injury, and the Board's alleged failure to identify in its decision the evidence it relied on in support of its decision.

III. Substantial Evidence Supporting Decision

"Our function on appeal is the same as that of the trial court in ruling on the petition for the writ. We must determine whether based on the entire record the Board's decision is supported by substantial evidence." (*Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd.* (1991) 1 Cal.App.4th 639, 643; Lab. Code, § 6629.) We do not review the trial court's decision, but the Board's.

The initial decision by the ALJ made a finding of fact that "[i]n the December 10, 2012 entry on Form 300, Employer did not identify, in column F, the object or substance that injured the employee." The decision discussed the requirements of section 14300.29(a), then stated: "On Employer's 2012 form 300, there was an entry indicating an injury to Norberto Gomez on December 10, 2012, but there was no entry in column F to indicate the 'object . . . that directly injured' Gomez. . . . This failure to insert information in column F for the Gomez injury was a violation of section 14300.29(a)."

On reconsideration, the Board extensively discussed section 14300.29 and determined it required employers to record on Form 300 the object that directly caused

the injured employee's injury. The Board found: "The evidence shows that Employer did not fill in all the information called for by section 14300.29(a), specifically the information to be entered in Column F on the 'Form 300,' the identity [of] the object which caused the injury in question." Thus, the Board found the violation of the regulation in the entry on Form 300 itself. We conclude Form 300 itself constituted substantial evidence of the violation.

Key Energy argues that in administrative mandamus cases, there "is a [statutory] requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis." (*Id*. at p. 516, fn. omitted.)

In this case, very little was required to bridge any analytic gap between the raw evidence and the Board's ultimate decision. The Board concluded section 14300.29(a) required that the log of a workplace injury on Form 300 include a description of the object that directly injured the employee. It reviewed Key Energy's log entry for Gomez's injury. It found the entry failed to contain any information about the object that directly caused the injury; therefore Key Energy violated section 14300.29(a). Substantial evidence supports the Board's factual findings, and the findings support its conclusion.

The Board also addressed Key Energy's argument that it complied with section 14300.29(a) without entering any information in column F of Form 300, because it did not know what object directly injured Gomez; the eyewitnesses who testified stated

they did not see what, if anything, struck Gomez, and Gomez had no memory of the accident because of his head injury. The Board concluded the record contained substantial evidence that Gomez was struck by the wet box, so it was reasonable to require Key Energy to include that information on Form 300.

The record contains no evidence supporting Key Energy's argument. It offered no evidence regarding the reason for its omission of information from column F of Form 300 for Gomez's accident. For example, there was no testimony from the person who made the entry for Gomez's accident that information regarding the object that directly caused his injury was omitted because the identity of the object was unknown. In fact, as the Board noted, none of the entries in Key Energy's Form 300 logs for 2010 through 2012 contained any identification of the object directly causing the injury.[6] A reasonable inference could be drawn from that evidence that Key Energy routinely excluded from its Form 300 log entries any reference to the object that caused the injury, regardless whether the object had been identified.

Further, shortly after the accident that injured Gomez, Key Energy conducted itself as if the wet box were the object that directly injured him. On the day after the accident, Key Energy's senior safety advisor, Dorado, reported the injury to the Division and advised its associate safety engineer, Stacey Christian, that there had been a pressure release while an oil well was being repaired, and the pressure release had pushed the wet box, which had struck Gomez's hard hat, injuring him Christian took the information down on a report form as Dorado provided it.

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6 The Board's decision on the petition for reconsideration states: "Further, although not at issue in this proceeding, Employer's Form 300 log in evidence has no entries in Column F either for any of the injuries or illnesses recorded, which indicates a history of noncompliance, though whether due to ignorance or other reason we need not resolve here." The other entries in the Form 300 logs were not in issue because the ALJ implicitly found citations on those entries were barred by the statute of limitations. The forms, however, were admitted into evidence at the administrative hearing without objection.

The following day, consistent with Dorado's report, Rice, Key Energy's head of corporate safety, showed Hammer, who was investigating the accident for the Division, the wet box and demonstrated how Gomez had been using it just prior to the pressure release. Rice also told her the blast blew the wet box into a tree and showed her pictures of the wet box in the tree. Although Hammer did not testify that Rice expressly stated that the wet box had struck Gomez or caused the injury, Rice's conduct in showing Hammer the damaged wet box, a photo of the wet box where it came to rest in a tree, and a similar, undamaged wet box, implicitly confirmed the report that the wet box was the object that caused Gomez's injury.

Additionally, Gomez testified that the last thing he remembered before the accident was grabbing the wet box and raising it from the floor. He also recalled being hit in the head. Gomez testified Eduardo Hernandez, a safety captain for Key Energy who was present at the time of the accident, told him at the hospital after his injury that the wet box had hit him.[7]

Key Energy contends this evidence is inadmissible, incompetent hearsay, and the Board instead should have credited the testimony of Gomez's coworkers that they did not see what, if anything, struck Gomez. At the hearing, Key Energy objected to Hammer's testimony concerning what Rice told her about the accident; the ALJ overruled the objection, apparently on the ground Rice's statements were party admissions. (Evid. Code, §§ 1221, 1222.) Key Energy has not demonstrated in this appeal that the evidence of Rice's conduct constituted hearsay, or that Rice's statements were not admissible as party admissions.

As to hearsay evidence, in proceedings before the Board:

> "No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, or finding made and filed as specified in this division. No order, decision, or finding shall be invalidated because

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[7] Hernandez testified at the hearing that he did not see if anything hit Gomez.

> of the admission into the record, and use as proof of any fact in dispute of any evidence not admissible under the common law or statutory rules of evidence and procedure." (Lab. Code, § 6612.)
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> Similarly, the regulations governing the Board's hearings provide:
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> "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Cal. Code Regs, tit. 8, § 376.2.)

Thus, the Board was authorized to receive and consider hearsay evidence, and was entitled to use it to supplement or explain other admissible evidence, including evidence of Rice's statements and conduct. The injury report to the Division was made by Dorado, senior safety advisor in charge of west coast safety for Key Energy, whose job duties included recording incidents and accidents and who investigated Gomez's accident. The injury report to the Division would appear to be "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Cal. Code Regs, tit. 8, § 376.2.) Thus, it would be admissible at the administrative hearing, and the Board could rely on it, on this ground as well.

In focusing on the Board's statement that the record contained substantial evidence that Gomez was struck by the wet box, and in attempting to show the error in that statement, Key Energy assumes that an employer is excused from completing column F of Form 300 if the employer is unsure of the object that caused the injury. It cites no authority for that assumption, and makes no reasoned argument in support of it. In this case, even if Key Energy was uncertain whether the wet box struck Gomez and caused his injury, it was undisputed he was injured by a pressure blast from the tubing of the oil well. Nonetheless, Key Energy failed to include in its Form 300 entry any information about the blast or the wet box as the object that caused Gomez's injury.

The purpose of requiring the employer to identify objects that cause workplace injuries appears to be to enable the Division to better regulate safety in workplaces. When an injury occurs, the Division may direct its inspection toward the offending object and the manner in which it is used or operates in the workplace, and determine whether different or additional safety measures are needed to avoid similar injuries in the future. (See Lab. Code, § 6308 [authorizing the Division to prescribe safety devices, safeguards, and other safety measures to be used in workplaces].) The purpose of the requirement would be defeated or impeded if the employer were permitted to ignore the requirement that it specify the object that directly injured the employee, rather than requiring it to provide whatever information was available to it about the cause of the injury, and later claim it provided no information because it was unsure of the identity of the object.

In sum, the Board's conclusion that the record contained substantial evidence that Gomez was struck by the wet box was not a finding essential to the Board's decision upholding the Form 300 citation. Further, Key Energy has not established that the Board's conclusion was inadequately supported by the evidence. It has not demonstrated that all the evidence supporting the Board's conclusion was inadmissible hearsay. The Board was permitted to consider hearsay to supplement and explain other evidence. The Board credited the information Key Energy gave the Division immediately after the incident, around the time the entry on Form 300 was presumably made.[8] We cannot reweigh the evidence to give greater weight to the testimony of Gomez's coworkers, who denied at the hearing months after the accident that they saw anything strike Gomez when the pressure blast occurred.

Substantial evidence supports the Board's findings that Key Energy failed to record information regarding the object that directly injured Gomez in its Form 300 entry

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[8] The employer is required to make an entry on its Form 300 injury log within seven days after receiving information that a recordable injury has occurred. (§ 14300.29, subd. (b)(3).)

regarding the Gomez injury, and it therefore failed to fully complete that form as required by section 14300.29(a). The findings support the Board's decision upholding the citation that charged Key Energy with violating section 14300.29(a). Key Energy has not established any error in the Board's decision.

DISPOSITION

The judgment denying the writ of mandate is affirmed. Respondents are entitled to recover their costs on appeal.

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HILL, P.J.

WE CONCUR:

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GOMES, J.

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SMITH, J.