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SOUTH COAST AQMD
CLERK OF THE BOARDS
2025 FEB 12 PM 5:00

BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In The Matter Of BAKER COMMODITIES, INC., [Facility ID No. 800016] Petitioner, vs. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, Respondent.	Case No. 6223-2 **SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO THE ORDER FOR ABATEMENT; MEMORANDUM IN SUPPORT THEREOF; [PROPOSED] ORDER** Date: February 26, 2025 Time: 9:30 am Place: Hearing Board South Coast Air Quality Management District 21865 Copley Drive Diamond Bar, CA 91765

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 26, 2025, at 9:30 a.m. or as soon thereafter as the matter may be heard by the South Coast Air Quality Management District Hearing Board ("Hearing Board"), located at Hearing Board Room, 21865 Copley Drive, Diamond Bar, CA 91765, Appellee/Respondent, South Coast Air Quality Management District ("South Coast AQMD" or District"), will and hereby does move the Hearing Board for an order in limine to exclude from presentation before the Hearing Board, any and all evidence, references to evidence, testimony or argument relating to the following:

1. Evidence and argument related to the Order for Abatement, including any stipulations, references to testimony and hearing board member deliberation prior to Baker's decision to submit the details of the permit applications that are before this Hearing Board, except to specify the conditions from the Second Modified Order for Abatement Case No. 6223-1.
2. Evidence and argument related to the alleged importance of Baker's animal rendering operations, which Baker ceased performing and are not included in the permit applications.

This motion is based upon the grounds that the evidence is irrelevant and seeks to revisit issues that no longer reflect the operations described by Baker in their permit applications, and it will result in an inefficient hearing that will waste the Hearing Board's time and resources, and cause confusion.

This motion is made under the Hearing Board Rules and Procedures, Rule 6(a) and Rule 9(b)(4), and it is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter. Filed with this motion is Attachment D, which contains copies of the authorities cited in the Memorandum of Points and Authorities, as required by Hearing Board Rule 6 (e)(4).

Dated: February 12, 2025,

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT

DAPHNE P. HSU
Principal Deputy District Counsel
NICHOLAS P. DWYER
Senior Deputy District Counsel
Attorneys for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Baker's appeal revisits ten days' worth of transcripts, thousands of pages containing argument, testimony, and deliberations from proceedings that decided issues on Baker's operations that are different from the operations identified in Baker's permit appeal. The Hearing Board should not waste its time hearing the parties relitigate the history of the Order for Abatement. This Hearing Board is well aware of the proceedings and litigation that led us to the changed operations reflected in Baker's permit appeal. Attempting to revisit those issues and arguments would require the District and the Hearing Board to reexamine issues that have long been decided and the conclusion of those proceedings are reflected in the operations sought by Baker in their permit applications. If Baker wanted to rehear prior Order for Abatement decisions and findings, they should have requested a timely rehearing of those issues. What is before the Hearing Board is a permit appeal. That's it.

Petitioner/Appellant Baker Commodities, Inc.'s ("Baker") pleading titled "RESPONDENT BAKER COMMODITIES, INC.'S APPEAL OF REVISED VERNON FACILITY PERMIT INCORPORATION OF RULE 415" ("Permit Appeal[1]") contains many statements and allegations related to the Order for Abatement, Case No. 6223-1. For the Permit Appeal, the Order for Abatement is only relevant to the extent the latest conditions required Baker to obtain permits and Baker is seeking relief in its Permit Appeal to insert conditions similar to those in the Order for Abatement into the permit and objects to the reference to Rule 415 and "sludge." The rest of the background and the several hearings are irrelevant. Baker conveniently seeks the benefit of including arguments from prior abatement proceedings that it has identified as benefitting their Permit Appeal, but any such approach is prejudicial to the District without allowing an examination of those prior proceedings that allows for the identification of prior inconsistent statements and other evidence introduced by Baker. The District seeks to avoid such a lengthy and inefficient proceeding by limiting the scope to

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[1] Including the Supplement filed January 28, 2025.

examination of the permit application, permit issued and most recent Order for Abatement conditions.

Respondent/Appellee South Coast Air Quality Management District ("South Coast AQMD" or "District") moves for an order from the Hearing Board to limit parties from raising the Order for Abatement history, other than to acknowledge there is an Order for Abatement and the latest order requiring Baker to apply for permits for several enclosures and processes.[2] The District does not dispute that the conditions in the Second Modified Order for Abatement are relevant to the relief Baker seeks in the Permit Appeal. The arguments raised in Baker's petition and reference to hearing transcripts from prior Order for Abatement proceedings serves no purpose other than to relitigate issues and prior decisions of this Hearing Board. Again, Baker is challenging the permit issued by the District's Executive Officer, and any examination or revisiting of prior irrelevant Order for Abatement history will be a waste of time and resources for the parties and the Hearing Board.

In addition to this motion in limine, South Coast AQMD concurrently filed a motion to strike the portions in Baker's Permit Appeal related to the Order for Abatement for similar reasons that the material is irrelevant and immaterial.

The requested relief sought by the District's motion in limine will result in an efficient appeal that avoids revisiting already litigated and resolved issues, thus narrowing the proceedings consistent with the Health and Safety Code, Hearing Board rules and procedures, and consistent with the Evidence Code.

If the Hearing Board does not grant this motion, at a minimum the Hearing Board should strike the requested portions of the Permit Appeal identified by the District where Baker cherry picked evidence and based arguments on prior irrelevant Order for Abatement history, and pursuant to the scheduling order, the entirety of the Order for Abatement hearing transcripts are

[2] During the January 21, 2025, prehearing conference, the parties, Chair, and Member Pearman discussed the scheduling and briefing for the District's motion to strike and motion in limine. In addition, the District reached out to Baker's counsel separately and discussed the motions with them, seeking possible agreement. The District continues to be open to stipulations on these matters.

to be lodged by Baker with the Hearing Board. The complete picture would need to be presented to the Hearing Board, rather than only the misleading snippets highlighted by Baker to the prejudice of the District.

Relitigating points raised in ten days' worth of earlier hearings, will take time and efficiency away from the focus of the Permit Appeal to examine whether the permitting decision was proper or not. In the interest of efficiency for the Permit Appeal hearing on March 27, 2025, the District moves for an order to limit the references to the Order for Abatement, including any stipulations, references to testimony and hearing board member deliberation prior to Baker's decision to submit the details of the permit applications that are before this Hearing Board, except to specify the conditions from the Second Modified Order for Abatement Case No. 6223-1, and limit references to the importance of rendering and Baker's contribution to that industry.

II. THE CHAIR OR HEARING BOARD MAY EXCLUDE IRRELEVANT EVIDENCE

Hearing Board Rules and Procedures, Rule 6 (a) provides that "[p]arties may make appropriate motions in any matter." A motion in limine is made "to exclude evidence before it is offered at trial on the ground that the evidence is either irrelevant or subject to discretionary exclusion as unduly prejudicial." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1480–1481.)

Hearing Board Rules and Procedures, Rule 9 (b)(4) states:

> Irrelevant and unduly repetitious evidence shall be excluded. The Chair or **Hearing Board**, in its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, or confuse the issues or where matters sought to be proved are otherwise established.
>
> [Bold in original.]

"Relevant evidence" means evidence … having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends, 'logically, naturally, and by

reasonable inference' to establish material facts...." (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1213 (internal quotes and citations omitted).)

III. THE ANTICIPATED EVIDENCE AND ARGUMENT IDENTIFIED IN BAKER'S PETITION SIGNALS AN ATTEMPT TO TAKE A SECOND BITE AT THE APPLE GUARANTEEING AN INEFFICIENT PERMIT APPEAL HEARING

A. *The Order for Abatement Hearings are Not Relevant or Material to the Executive Officer's Permitting Decision Regarding Applicable Regulations.*

For the Permit Appeal the question is whether the Executive Officer properly issued the permit, without the requested changes from the Petitioner, Baker. The Hearing Board's role in determining that question is to "simply determin[e] whether the [Executive Officer]'s interpretation and application of the applicable regulations was correct as a matter of law." (*Valero Refining Company - California v. Bay Area Air Quality Management District Hearing Board* (2020) 49 Cal.App.5th 618, 640 disapproved of on other grounds by *Meinhardt v. City of Sunnyvale* (2024) 16 Cal.5th 643.) The Order for Abatement history is irrelevant for that inquiry.

The many hearings related to the Order for Abatement litigated different factual scenarios. None of those hearings ever resolved the issue that is the subject of the Permit Appeal, i.e., whether Rule 415 applies to Baker's facility where it conducts collection center activity and trap grease type rendering. The District's concern is the parties fully litigated the facility's operations in prior Orders for Abatement; reached settlement on writ, civil complaint, and trade secret claims; and Baker made the decision to alter their operations following the extensive process described above. Baker's attempts to selectively identify issues to steer the proceedings in a self-serving direction must be denied. To conduct an appropriate hearing on appeal, whether the permit was properly issued per Health and Safety Code section 42302.1, this Hearing Board need look no further than: (1) seeing what Baker submitted in their permit application; (2) reviewing what are the substantive terms of the permit issued by the District; (3) and examining the permitting decision. The latest Order for Abatement conditions are only relevant to petitioner's requested relief. The proceedings that led to the Order for Abatement are not part of this decision.

Further, a permit appeal is different procedurally than an order for abatement, such that including extensive discussion of the Order of Abatement history could lead to confusion. For the Permit Appeal, the Hearing Board is reviewing the determination of the Executive Officer, and the burden rests with the Petitioner, Baker, to prove the District's decision that Baker is subject to Rule 415 is improper. Baker must show that the District did not apply its own rules correctly. In contrast, an order for abatement requires the petitioner, which was the District, in that circumstance, to prove that a violation of a District rule or permit occurred and is occurring such that the respondent should be required to abate the violation. In an order for abatement, the Hearing Board's order directs the violating party to stop a prohibited action. Relitigating the history of the Order for Abatement confuses the issues.

Further, stipulations for an order for abatement are proper under the Health and Safety Code section 42451(b), but they do not apply here. Statements by sole hearing board members, discussing a different factual scenario are not relevant, and even if the Order for Abatement hearings were relevant, only the end result would be relevant: the Hearing Board's Findings and Decision. The District incorporates by reference the arguments set forth in its motion to strike, filed concurrently. For the reasons stated above, the Order for Abatement history should be excluded, but for the limited exception of stating the conditions in the currently effective Order for Abatement.

B. *The Arguments in Baker's Petition Discussing the Importance of the Rendering Industry and Baker's Contributions are Irrelevant for Determining Applicable Regulations.*

No one is disputing the importance of rendering within the state of California. Raw rendering materials should be processed and recycled. For the Permit Appeal, covering this topic is an inefficient use of the Hearing Board's resources because it is immaterial to the District's permitting decision that Rule 415 applies to Baker's facility where collections and trap grease type rendering are both occurring.

Arguments or testimony about the alleged importance of Baker's operations are irrelevant to the Permit Appeal, so the Hearing Board should exclude these matters from being introduced

1 during the Permit Appeal hearing. The focus of the Permit Appeal should be on whether Rule 415
2 applies to Baker as configured and whether there are any applicable exemptions.
3 **IV. CONCLUSION**
4 Based on the foregoing, the Hearing Board should exclude any testimony, argument, or
5 mention of the Order for Abatement history other than what is specifically stated in the attached
6 Proposed Order. Similarly, the Hearing Board should exclude any testimony, argument, or
7 mention of Baker's alleged importance.
8 Dated: February 12, 2025,

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

DAPHNE P. HSU
Principal Deputy District Counsel
NICHOLAS P. DWYER
Senior Deputy District Counsel
Attorneys for Petitioner

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ATTACHMENT D

201 Cal.App.4th 1475
Court of Appeal, Fifth District, California.

Alejandro CEJA et al., Plaintiffs and Appellants,
v.
DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.

No. F058568.
|
Nov. 21, 2011.
|
Rehearing Denied Jan. 13, 2012.
|
Review Denied March 14, 2012.

Synopsis
Background: Family members of driver and passenger who were killed when driver's northbound vehicle crossed highway median and struck two southbound vehicles filed wrongful death action against Department Of Transportation (DOT). The Superior Court, Stanislaus County, No. 349190, David G. Vander Wall, J., entered judgment on jury verdict in favor of DOT. Family members appealed.

The Court of Appeal, Levy, Acting P.J., held that evidence of accident history prior to reconfiguration of highway from four lanes to six lanes and of median width from 84 feet to 60 feet was not relevant to prove that reconfigured freeway was in a dangerous condition, based on the absence of a median barrier, at time of accident at issue.

Affirmed.

Attorneys and Law Firms

****437** Law Offices of Carcione, Cattermole, Dolinski, Okimoto, Stucky, Ukshini, Markowitz & Carcione, Law Offices of Carcione, Cattermole, Dolinski, Stucky, Markowitz & Carcione, Joseph W. Carcione, Jr., Gary W. Dolinski and Joshua S. Markowitz, Redwood City, for Plaintiffs and Appellants.

Ronald W. Beals, West Sacramento, Thomas C. Fellenz, Jeanne Scherer, Peter Winslow, Sacramento, and Peter Ackeret for Defendant and Respondent.

***1477 OPINION**

LEVY, Acting P.J.

In May 2003, Gerardo Ceja and Simon Olivarez were killed in a cross-median accident on State Route 99 (SR 99). Appellants, the decedents' surviving family members, sued respondent, the Department of Transportation (Department), for wrongful death damages. Appellants alleged that the lack of a median barrier created a dangerous condition.

In 1992, the Department conducted an investigation of the stretch of SR 99 that included the accident location. A Department engineer recommended that a median barrier be installed. However, because this section of highway was to be reconfigured, **438 it was decided that a median barrier would not be installed. This reconfiguration was completed in 1994. Four lanes of expressway and freeway with an 84-foot median became six lanes of freeway with a 60-foot median.

Before trial, the Department moved in limine to exclude evidence of four accidents that occurred before 1994 on the ground that the physical condition at the accident location had substantially changed. The trial court granted the motion.

The jury found that the accident location was not in a dangerous condition and judgment was entered in the Department's favor. Appellants contend this *1478 judgment must be reversed because the trial court excluded relevant evidence of pre–1994 cross-median accidents when it granted the Department's in limine motion.

As discussed below, the trial court did not abuse its discretion when it excluded the pre–1994 accident evidence. The physical conditions existing before 1994 were substantially different from those existing in 2003. Accordingly, the judgment will be affirmed.

BACKGROUND

On May 25, 2003, Ceja was driving his car northbound on SR 99. Olivarez was a passenger. Ceja's car crossed the median and struck two southbound vehicles. Ceja and Olivarez died at the scene. This accident occurred 661 feet north of Keyes Road. The roadway consisted of six lanes of freeway with opposing traffic separated by a 60-foot median.

1. *Median barrier warrants.*

A median barrier is not necessarily a beneficial addition to a freeway. While a median barrier prevents nearly all cross-median accidents, it also halves the recovery room for an out- of-control vehicle and is a fixed object that can cause serious injury either by direct impact or by deflecting vehicles back into traffic. (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 724, 95 Cal.Rptr.2d 719 (*Alvarez*), abrogated on other grounds in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 74, fn. 3, 109 Cal.Rptr.2d 1, 26 P.3d 332 (*Cornette*).) Thus, a median barrier usually results in an increase in accidents and injuries. However, cross-median accidents tend to be more severe than other types of collisions. Accordingly, the Department's challenge is to balance the reduction of accident severity against a greater frequency of accidents and injuries.

In an effort to strike this balance, the Department has developed criteria, referred to as warrants, to identify those locations that should be evaluated to decide whether a median barrier is appropriate. A warrant is not a determination that a median barrier is required at the location, only that conditions there merit further study.

There are two types of warrants, traffic volume/median width warrants and accident warrants. Traffic volume/median width warrants index traffic volume to median width. This warrant reflects the fact that as traffic volumes rise, the chance that an errant vehicle will cross the median increases. At the same time, the possibility that such an errant vehicle will reach the opposing lanes and collide with another vehicle decreases as the median becomes wider. *1479 *Alvarez, supra,* 79 Cal.App.4th at pp. 724–725, 95 Cal.Rptr.2d 719.) Between 1964 and 1997 a median width greater than 45 feet did not trigger an investigation into a median barrier regardless of traffic volume. In 1997 the Department changed that policy to trigger an **439 investigation for median widths up to 75 feet.

The second independent basis for considering the placement of a median barrier is the accident warrant. This warrant reflects the actual operating history of the location. It is based on the premise that, for whatever reason, some locations experience a higher number of cross-median accidents than would be anticipated for a highway with the same median width and traffic

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volume. Since 1978, the threshold rate has been met by either 0.50 cross-median accidents of all types per mile per year or 0.12 fatal cross-median accidents per mile per year. A minimum of three accidents in a five-year period is required.

2. ***The 1992 accident warrant.***

In June 1992, the accident warrant was met for a 0.39- mile stretch of SR 99 that included the subject accident location. There had been three nonfatal cross-median accidents from 1987 to 1991, creating an accident rate of 1.54 cross-median accidents per mile per year. Accordingly, an investigation was conducted.

A state civil engineer initially recommended that a median barrier be constructed. However, upon review and discussions with that state engineer, the lead engineer for the median barrier monitoring program concluded that a median barrier should not be installed. The state engineers based this decision on the following factors: (1) the number of cross-median accidents just met the minimum of three accidents; (2) only one of the cross-median accidents was an injury accident; (3) the road was going to be reconfigured to add two additional lanes that would result in a reduction of traffic congestion; and (4) the resulting median width would be 60 feet, which was more than the 45-foot width specified in the median barrier guidelines at the time.

The reconfiguration of that stretch of SR 99 was completed in July 1994. Two lanes were added for a total of six, the transition on both ends from six lanes to four was eliminated, the entire stretch became freeway, and the median width was decreased from 84 feet to 60 feet in the area where the Ceja accident would later occur.

3. ***The 1998 decision to install a median barrier.***

There were no cross-median accidents along the reconfigured section of SR 99 until April 17, 1999. Thus, over four years and nine months passed ***1480** without a cross-median accident. Nevertheless, due to the change in the traffic volume/median width criteria to include median widths up to 75 feet, this location met the traffic volume/median width warrant in 1998. This area was investigated and a median barrier was recommended. In 1999 the median barrier project was approved with a completion date of October 2004. The median barrier was completed in July 2004.

However, after the Department decided to install a median barrier but before the project was completed, a new accident history developed for the reconfigured highway. Between April 17, 1999, and February 22, 2003, there were 11 cross-median accidents, six of them fatal, along a 2.75-mile stretch of roadway. As noted above, the Ceja accident occurred on May 25, 2003.

4. ***The Department's motion in limine.***

The Department moved in limine for “an order instructing all parties and counsel not to refer to, question any witness concerning, comment on, or suggest to the jury in any way, anything about the number of cross-median accidents at the subject location prior to July 1994 when the ****440** conditions of the freeway were substantially different from those conditions that existed after July 1994.” The trial court granted this motion.

5. ***The trial and special verdict.***

At trial, appellants argued that the accident location constituted a dangerous condition of public property. Appellants presented evidence of the 11 cross-median accidents that occurred between 1994 and 2003 and expert testimony that SR 99 was unsafe.

The jury found that SR 99 at the accident location was not in a dangerous condition at the time of the collision. Accordingly, judgment was entered in favor of the Department. The jury did not reach the issues of causation or the Department's reasonableness.

DISCUSSION

Appellants contend the trial court erred in granting the motion in limine and in excluding both the pre–1994 accidents and the state engineers' 1992 recommendation that a median barrier be installed. According to appellants, this evidence was relevant to prove a dangerous condition and its exclusion was prejudicial.

1. *Standard of review.*
A motion in limine is made to exclude evidence before it is offered at trial on the ground that the evidence is either irrelevant or subject to ***1481** discretionary exclusion as unduly prejudicial. (*Ulloa v. McMillin Real Estate & Mortgage, Inc.* (2007) 149 Cal.App.4th 333, 337–338, 57 Cal.Rptr.3d 1; *Condon–Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392, 57 Cal.Rptr.3d 849.)

Generally, a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 94 Cal.Rptr.2d 396, 996 P.2d 46.) Accordingly, an in limine ruling to keep particular items of evidence from the jury is subject to reversal only where the trial court exceeded the bounds of reason. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478, 243 Cal.Rptr. 902, 749 P.2d 339.) In other words, the appellate court will not disturb the trial court's decision unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1456, 250 Cal.Rptr. 812.) Moreover, when two or more inferences can reasonably be deduced from the facts, the appellate court cannot substitute its decision for that of the trial court. (*Shamblin v. Brattain, supra,* 44 Cal.3d at pp. 478–479, 243 Cal.Rptr. 902, 749 P.2d 339.)

2. *The trial court did not abuse its discretion in excluding the pre–1994 accident history.*
Under Government Code section 835, a public entity may be liable for injury proximately caused by a dangerous condition of its property if the entity either creates a dangerous condition on its property or fails to remedy a dangerous condition when it has actual or constructive notice of the condition and had sufficient time to take preventive measures before the injury. (*Cornette, supra,* 26 Cal.4th at p. 66, 109 Cal.Rptr.2d 1, 26 P.3d 332; *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 438–439, 6 Cal.Rptr.3d 316.) “The state's failure to erect median barriers to prevent cross-median accidents may result in such liability.” (*Cornette, supra,* 26 Cal.4th at p. 68, 109 Cal.Rptr.2d 1, 26 P.3d 332.) However, to qualify as a “dangerous condition,” the condition must create a substantial, as distinguished from a minor, trivial or insignificant, risk of ****441** injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used. (Gov.Code, § 830, subd. (a).)

As discussed above, the Department uses the warrant system to identify those locations that should be evaluated to decide whether a median barrier is appropriate. In 1992 the accident warrant was met for the subject location. However, the Department decided not to install a median barrier because the highway was to be reconfigured in 1994. Appellants acknowledge that the highway changed but nevertheless argue that the accident history for the road when it was four lanes is relevant to prove that the now six-lane road was in a dangerous condition at the time of the accident.

***1482** The trial court has discretion to admit evidence of prior accidents where the conditions existing at the time of the respective accidents are shown to be similar. (*Johnston v. County of Yolo* (1969) 274 Cal.App.2d 46, 59, 79 Cal.Rptr. 33; *Martindale v. Atchison, T. & S.F. Ry. Co.* (1948) 89 Cal.App.2d 400, 411, 201 P.2d 48.) “Where a dangerous condition of property is involved, there must be proof that there was no substantial change during the interval between the accidents under consideration.” (*Alwood v. City of Los Angeles* (1956) 139 Cal.App.2d 49, 58, 293 P.2d 69.)

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Here, there was a substantial change in the physical conditions existing at the time of the pre–1994 accidents and the Ceja accident. The highway went from four lanes of freeway and expressway to six lanes of freeway and the transitions from six lanes to four lanes at each end of the section were eliminated. Thus, traffic congestion was relieved at this location. Under these circumstances, the trial court did not exceed the bounds of reason when it excluded the pre–1994 accident history. This evidence was not relevant. The accidents that occurred on the four-lane highway would not have a tendency to prove that the six-lane highway was in a dangerous condition. Rather, one would expect a six-lane highway to be safer than a four-lane highway.

Appellants argue that, because the number of lanes is not a factor in the median barrier warrant program, the addition of the two interior lanes in 1994 was immaterial to the accident history. It was a physical difference, but made no difference as to how the accident warrant is applied. Thus, appellants contend, the six-lane highway in 1994 was not substantially dissimilar from the previous four-lane highway and the pre–1994 accident history should have been admitted.

Contrary to appellants' position, the accident warrant parameters do not dictate what constitutes a substantial change in the location's physical condition. A warrant merely indicates that the location should be further evaluated, not that the location is in a dangerous condition.

Appellants further point out that in 1994 the median width narrowed from 84 feet to 60 feet. Therefore, appellants assert, the reconfigured highway was more dangerous than it had been when it was four lanes. Nevertheless, at that time, the median width warrant was not met unless the width was 45 feet or less.

Before ruling on the Department's in limine motion, the trial court mentioned that "[a]t some point it becomes cumulative as to the number of accidents." Based on this statement, appellants contend that the trial court granted the motion on the ground that the evidence was cumulative and that this reason did not justify the exclusion.

***1483** However, the Department did not make this argument. Rather, the Department's ****442** motion was based on the pre–1994 highway being substantially different from the reconfigured highway and the concomitant irrelevance of the pre–1994 accidents. Moreover, if the exclusion of evidence is proper on any theory, the exclusion must be sustained. (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173, 222 Cal.Rptr. 800.) A lower court order is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193.) Accordingly, a correct ruling will not be reversed simply because it may have been based on an incorrect reason. (*NMSBPCSLDHB v. County of Fresno* (2007) 152 Cal.App.4th 954, 966, 61 Cal.Rptr.3d 425.)

In sum, the trial court's exclusion of the accidents that occurred before the highway was substantially changed by the addition of two lanes was not arbitrary, capricious or patently absurd. Therefore, the trial court did not abuse its discretion in granting the Department's motion in limine.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

WE CONCUR: CORNELL and FRANSON, JJ.

All Citations

201 Cal.App.4th 1475, 135 Cal.Rptr.3d 436, 11 Cal. Daily Op. Serv. 15,163, 2011 Daily Journal D.A.R. 18,047

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West's Ann.Cal.Evid.Code § 210

§ 210. Relevant evidence

Currentness

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Credits

(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

This definition restates existing law. *E.g.,* Larson v. Solbakken, 221 Cal.App.2d 410, 419, 34 Cal.Rptr. 450, 455 (1963); People v. Lint, 182 Cal.App.2d 402, 415, 6 Cal.Rptr. 95, 102-103 (1960). Thus, under Section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of Code of Civil Procedure Section 1870, which are superseded by the Evidence Code. In addition, Section 210 makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is "relevant evidence." This restates existing law. See Code Civ.Proc. §§ 1868, 1870(16) (credibility of witnesses), which are superseded by the Evidence Code, and Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 Cal.Law Revision Comm'n, Rep., Rec. & Studies Appendix at 339-340, 569-575 (1964) (credibility of hearsay declarants). [7 Cal.L.Rev.Comm. Reports 1 (1965)].

Notes of Decisions (435)

West's Ann. Cal. Evid. Code § 210, CA EVID § 210
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

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Distinguished by People v. Reynolds, Cal.App. 1 Dist., November 15, 2019

60 Cal.4th 1198
Supreme Court of California

Ashley Jourdan COFFEY, Plaintiff and Appellant,
v.
Jean SHIOMOTO, as Director, etc., Defendant and Respondent.

No. S213545
|
April 6, 2015.

Synopsis
Background: Motorist petitioned for writ of mandate to challenge her administrative per se driver's license suspension based on blood alcohol content (BAC). The Superior Court, Orange County, No. 30-2012-00549559, Robert J. Moss, J., denied the petition, and motorist appealed. The Court of Appeal affirmed. Motorist petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Werdegar, J., held that:

expert testimony rebutted presumption that BAC at time of driving was at least 0.08 percent based on valid testing within three hours of driving;

non-chemical test circumstantial evidence could prove that motorist's BAC at time of driving was consistent with BAC as shown in later valid tests, disapproving *Brenner v. Department of Motor Vehicles*, 189 Cal.App.4th 365, 116 Cal.Rptr.3d 716;

non-chemical test circumstantial evidence could rebut expert testimony that motorist's BAC at time of driving was less than BAC as shown in later valid tests; and

evidence supported finding that motorist's BAC at time of driving was at least 0.08 percent.

Affirmed.

Opinion, 161 Cal.Rptr.3d 157, superseded.

Liu, J., filed concurring opinion.

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Opinion

*****541** WERDEGAR, J.

***1202** ****898** A California Highway Patrol officer stopped a car driven by plaintiff Ashley Jourdan Coffey after he observed her driving erratically. Four subsequent chemical tests revealed her blood-alcohol concentration (BAC) ranged from 0.08 to 0.096 percent. The officer then confiscated plaintiff's driver's license and served her with a notice that her license would be suspended pursuant to Vehicle Code section 13382.[1] In an administrative hearing to review the suspension, plaintiff's expert witness opined that her BAC was rising at the time of the chemical tests, suggesting her BAC was below the 0.08 percent threshold at the time plaintiff was driving. Both the Department of Motor Vehicles (DMV) hearing officer and the trial court discounted the expert's testimony in part by relying on arrest reports, which described the physical manifestations of plaintiff's intoxication, such as her general appearance, erratic driving, poor performance on field sobriety tests, and the strong odor of alcohol she projected.

We decide in this case whether the trial court erred by considering, in addition to the results of breath and blood tests, other circumstantial evidence of intoxication to conclude by a preponderance of the evidence that plaintiff drove with a BAC at or above 0.08 percent. As we explain, we conclude the trial court did not err.

*1203 FACTS

On November 13, 2011, at 1:32 in the morning, Sergeant Martin of the California Highway Patrol was traveling southbound on State Route 55 in Orange County when he saw a car traveling 60 miles per hour, swerving erratically from side to side. From the number four, or right-hand, lane, the car ****899** swerved one foot to the left into the number three lane before correcting. It then twice swerved one to two feet to the right, onto the highway's shoulder. Sergeant Martin positioned his patrol vehicle behind the car and activated his emergency lights, whereupon the car slowly moved left across the highway into the number one lane. When Martin activated his siren, the car veered even further left, into the carpool lane. Only when Sergeant Martin used his public address system and directed the driver to pull to the right did the car eventually comply.

Upon making contact with the driver of the vehicle, plaintiff Ashley Coffey, Sergeant Martin noticed her eyes were red and a strong odor of alcohol emanated from her car. Officer White arrived to provide backup and confirmed these observations. To both officers she denied having consumed any alcoholic beverages, offering the rather implausible story that she had just turned 21 years old, had been in a bar, but had not herself consumed any alcoholic beverages. The officers then had plaintiff perform various field sobriety tests. Plaintiff failed the horizontal gaze nystagmus test, "display[ing] a lack of smooth pursuit in both eyes."[2] Asked to complete the "walk-and-turn test," in which she was asked to walk heel to toe for nine steps, turn counterclockwise, and then walk back heel to toe, "she missed heel to toe on five of those nine steps by 2–4 inches on each step. When she reached *****542** step nine, ... she turned clockwise instead of counter clockwise as instructed.... [She] used both feet to make the turn instead of keeping her front foot in place" and on the return similarly "missed heel to toe three of the steps by 2–4 inches."[3]

***1204** Plaintiff did somewhat better on the "one-leg stand" test,[4] standing on one foot and ****900** counting out loud beginning with 1,001; the test was terminated when she reached 1,022 after 30 seconds. On the Romberg test,[5] "[s]he swayed slightly in all directions from center by 1–2 inches" and "estimated 30 seconds at 37 actual seconds." Plaintiff refused to perform a preliminary alcohol screening, or PAS.[6]

***1205** Based on the officers' observations of plaintiff and her poor performance on the *****543** field sobriety tests, they placed her under arrest at 2:00 a.m. Officer White advised her of the implied consent law[7] and she chose to perform a breath

test, although she failed several times to provide an adequate breath sample and had to be retested multiple times. At 2:28 a.m., 56 minutes after she was stopped by Sergeant Martin, her breath test registered a BAC of 0.08 percent. Three minutes later, at 2:31 a.m., her second breath test measured a BAC of 0.09 percent. Police then transported plaintiff to the Orange County jail, where she elected to have her blood drawn. The blood draw occurred at 2:55 a.m., one hour 23 minutes after plaintiff was pulled over by Sergeant Martin. The first test of the blood sample showed a BAC of 0.095 percent; the second measured 0.096 percent. As a result of these chemical test results, Officer White confiscated plaintiff's driver's license and issued her an "administrative per se suspension/revocation order" and temporary driver's license. (§ 13382; see *Lake v. Reed* (1997) 16 Cal.4th 448, 454–455, 65 Cal.Rptr.2d 860, 940 P.2d 311 (*Lake*).)

Plaintiff, charged with drunk driving (§ 23152), was allowed to plead to a "wet reckless" (§§ 23103 [misdemeanor reckless driving], 23103.5 [prosecutorial statement that alcohol was involved]; see *People v. Claire* (1991) 229 Cal.App.3d 647, 650 & fn. 2, 280 Cal.Rptr. 269), but requested a hearing before the DMV to challenge her license suspension (§ 13558).

At the ensuing administrative hearing, the DMV hearing officer had before her the "Officer's Sworn Statement" form, Officer White's arrest report and the supplemental reports of Sergeant Martin and Officer White. In addition to considering these documents, the hearing officer heard telephonic testimony from Jay Williams, a forensic toxicologist with extensive experience, who testified for plaintiff. Williams noted the result of plaintiff's first breath test was 0.08 percent, the second test three minutes later was 0.09 percent, and her blood sample taken about 20 minutes later tested at 0.095 and 0.096 percent. According to Williams, these results suggested the alcohol level in plaintiff's body was rising at the time of the tests and, given the totality of the circumstances, were consistent with plaintiff's BAC being *below* 0.08 percent at 1:32 a.m. when she was first pulled over by Sergeant Martin.

***1206** The DMV hearing officer rejected Williams's testimony regarding a rising BAC, explaining in her ruling that the witness's two conclusions—first, that plaintiff's BAC ****901** was rising at the time she was pulled over, and second, that it may accordingly be deduced that her BAC was below 0.08 percent when she was driving—were not supported by reliable evidence, were " too speculative to support the contention," and were "based on a subjective interpretation of the evidence." In addition, Williams's conclusions were "insufficient to rebut the official duty presumption," which in this context we take to be a *****544** reference to the presumption the chemical test results were valid. [8] The hearing officer reached this conclusion, she explained, because Williams had not himself examined the breath-analyzing device used in the case, offered no opinion whether it was in working order, conducted no scientific tests himself, and "did not show that any other experts in the scientific community had reached similar conclusions." Finally, the hearing officer specifically found credible Officer White's recordation of the "events as they occur[red]," which we assume meant White's observations of plaintiff's appearance and her performance on field sobriety tests. Accordingly, the hearing officer concluded plaintiff's license suspension was proper because the state had shown by a preponderance of the evidence that she had been driving with a BAC of 0.08 percent or higher.

Plaintiff filed a petition for a writ of mandate with the trial court to challenge the DMV hearing officer's decision. After first noting that section 23152, subdivision (b) makes it a rebuttable presumption that a person was driving with a BAC of 0.08 percent or higher if so tested at that level or higher within three hours of driving (see discussion, *post*), the trial court denied the writ, explaining that "[e]ven assuming that petitioner Coffey rebutted [this] presumption ..., there was sufficient evidence based on the blood-alcohol tests *and the other circumstantial evidence based on the assessment, observations and tests by the arresting officers at the scene* to support the DMV hearing officer's decision under the weight of the evidence." (Italics added.)

The Court of Appeal affirmed. In determining whether the trial court's decision was supported by substantial evidence, the appellate court opined ***1207** that "[t]he issue boils down to whether non-chemical-test circumstantial evidence can prove that Coffey's BAC at the time of driving was consistent with her BAC at the time of her chemical tests." Relying on this court's opinion in *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 198 Cal.Rptr. 145, 673 P.2d 732, the appellate court held in the affirmative. We granted review.

DISCUSSION

A. Background

The DMV suspended plaintiff's license to drive pursuant to the "administrative per se" law, "under which a person arrested for driving under the influence of alcohol, and who is determined to have a prohibited amount of alcohol in his or her blood, must have driving privileges suspended prior to an actual conviction for a criminal offense." (*Lake, supra,* 16 Cal.4th at p. 454, 65 Cal.Rptr.2d 860, 940 P.2d 311.) As we explained in that case, " '[t]he express legislative purposes of the administrative suspension procedure are: (1) to provide safety to persons using the highways by quickly suspending the driving privilege of persons who drive with *****545** excessive blood-alcohol levels; (2) to guard against erroneous deprivation by providing a prompt administrative review of the suspension; and (3) to place no restriction on the ability of a prosecutor to pursue related criminal actions.' " (*Ibid.*) "[T]he administrative per se laws were deemed necessary due to the time lag that often occurs between an arrest and a conviction for driving while intoxicated or with a prohibited BAC. During this interim ****902** period, arrestees who could eventually be convicted of an intoxication-related driving offense were permitted to continue driving and, possibly, endangering the public thereby. Moreover, without administrative per se laws, persons with extremely high BAC levels at the time of arrest could escape license suspension or revocation by plea bargaining to lesser crimes or entering pretrial diversion. Thus, by providing for an administrative license suspension prior to the criminal proceeding, the law affords the public added protection." (*Id.* at pp. 454–455, 65 Cal.Rptr.2d 860, 940 P.2d 311.)

Pursuant to the administrative per se law, "[a]fter either the arresting officer or the DMV serves a person with a 'notice of an order of suspension or revocation of the person's [driver's license],' the DMV automatically reviews the merits of the suspension or revocation. [Citation.] The standard of review is preponderance of the evidence [citation], and the department bears the burden of proof." (*Lake, supra,* 16 Cal.4th at p. 455, 65 Cal.Rptr.2d 860, 940 P.2d 311.) A driver served with such a suspension notice is entitled to a hearing on request (§ 13558, subd. (a)), at which the only issues to be decided for drivers such ***1208** as plaintiff[9] are whether the arresting officer had reasonable cause to believe she was driving, whether she was arrested for an enumerated offense, and whether she was driving with 0.08 percent BAC or higher. (§ 13557, subd. (b)(3)(A), (B), & (C)(i).) If the DMV hearing officer finds these three statutory prerequisites proved by a preponderance of the evidence, the accused's driver's license will be suspended for four months if the driver has had a clean driving record (§ 13353.3, subd. (b)(1)). Higher penalties apply to those with prior drunk driving convictions. (§ 13353.3, subd. (b)(2).)

B. The Rebuttable Presumption in Section 23152

We first address whether the presumption created by section 23152, subdivision (b) controls this case. That provision states in part: "In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving." Although the statutory language speaks in terms of a "prosecution," several Courts of Appeal have held this presumption is not limited to criminal prosecutions but also applies in administrative license suspension proceedings. (*Corrigan v. Zolin* (1996) 47 Cal.App.4th 230, 236, 54 Cal.Rptr.2d 634, citing *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 740, fn. 9, 27 Cal.Rptr.2d 712, and *Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 310–313, 13 Cal.Rptr.2d 830.)

Extending the reach of Vehicle Code section 23152, subdivision (b)'s evidentiary *****546** presumption to administrative per se proceedings would be consistent with the legislative history of that provision. The need for the presumption "arose from the absence in '[e]xisting law' of any 'provision for the delay involved between the time a person is arrested for [driving under the influence] and when the chemical test for BAC is actually administered,' of any 'means to determine a person's BAC at the time the person is actually *driving* the car,' or of any 'mention of time parameters for the administering of chemical tests and for their

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admission as [admissible] evidence into a court of law.' (Health & Welf. Agency, Dept. of Alcohol & Drug Programs, Enrolled Bill Rep. for Sen. Bill No. 745 (1981–1982 Reg. Sess.) Sept. 1982, original italics.) Thus, in enacting the presumption, the Legislature intended (1) to 'diminish the arguments that ha[d] arisen when extrapolating the [BAC] at the time of the test back to the time of the driving' (Bus. & Transportation Agency, DMV, Enrolled Bill Rep. for Sen. Bill No. 745 (1981–1982 Reg. Sess.) Sept. 1982), ***1209** (2) 'to close a potential loophole in the current law, whereby a person ... could claim that he or she had consumed ... alcohol which had not yet been ****903** absorbed into the bloodstream while the person was operating the vehicle, but which later raised the blood alcohol level' (Governor's Office, Dept. of Legal Affairs, Enrolled Bill Rep. for Sen. Bill No. 745 (1981–1982 Reg. Sess.) Sept. 1982), and (3) 'to recognize that alcohol concentrations dissipate over time, so that a person whose blood alcohol levels exceed the permissible concentrations at the time of the test, was likely to have had unlawfully high blood alcohol levels when driving....' " (*Bell v. Department of Motor Vehicles, supra,* 11 Cal.App.4th at p. 311, 13 Cal.Rptr.2d 830.) These three statements of legislative intent would arguably apply to administrative per se proceedings as well.

Consistent with the previously cited Court of Appeal cases, both parties assume section 23152's presumption applies in administrative per se hearings. We need not resolve that question, however, because even were the presumption applicable, it was rebutted in this case. An explanation of how the presumption operates can be found in the Evidence Code. Section 601 of that code provides: "A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." Vehicle Code section 23152, subdivision (b), by its terms, creates a rebuttable presumption, and we agree with the parties that it establishes a presumption affecting the burden of producing evidence, not the burden of proof. A statute transferring the burden of proof to a driver facing a criminal charge of drunk driving would raise serious constitutional questions (see *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 [a permissive presumption is constitutional if, among other things, it "does not shift the burden of proof"]; see *People v. Gamache* (2010) 48 Cal.4th 347, 376, 106 Cal.Rptr.3d 771, 227 P.3d 342 [rejecting claim that jury instruction "impermissibly alters the burden of proof," explaining the "instruction does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt"]), and although those concerns are inapplicable here because it is an administrative per se proceeding, neither party argues for a different construction. (See *People v. Dubon* (2001) 90 Cal.App.4th 944, 953, 108 Cal.Rptr.2d 914 ["When a presumption is established to facilitate the determination of the particular action in which the presumption *****547** is applied, rather than to implement public policy, it is a presumption affecting the burden of producing evidence."].)

A rebuttable presumption requires the trier of fact, given a showing of the preliminary fact (here, that a chemical test result showed plaintiff had a BAC of 0.08 percent or more within three hours of driving), to assume the existence of the presumed fact (here, that plaintiff had been driving with a prohibited BAC) "unless and until evidence is introduced which would ***1210** support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." (Evid.Code, § 604.) In other words, if evidence sufficient to negate the presumed fact is presented, the "presumption disappears" (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421, 100 Cal.Rptr.2d 818) and "has no further effect" (*In re Heather B.* (1992) 9 Cal.App.4th 535, 561, 11 Cal.Rptr.2d 891), although "inferences may nevertheless be drawn from the same circumstances that gave rise to the presumption in the first place" (*Craig v. Brown & Root, Inc., supra,* at p. 421, 100 Cal.Rptr.2d 818; see Evid.Code, § 604 ["Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate"]).

Assuming the results of her breath and blood tests gave rise to a presumption she was driving with a BAC of 0.08 percent or more, plaintiff argues the testimony of her expert witness, Jay Williams, supplied the necessary contrary evidence sufficient to rebut the presumption. By contrast, the DMV argues Williams's testimony was insufficient, arguing that evidence necessary to rebut the presumption must be substantial, i.e., " 'reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of ****904** the essentials which the law requires in a particular case.' " Asserting the DMV hearing officer's refusal to

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credit Williams's views shows his testimony was insubstantial, the DMV argues his testimony was accordingly insufficient to rebut the statutory presumption.

The DMV misapprehends Evidence Code section 604. That section provides that evidence is sufficient to rebut a presumption if it "*would support* a finding of [the] nonexistence of" the presumed fact. (Italics added.) The most reasonable meaning of this phrase is that if the predicate facts are found, Vehicle Code section 23152's presumption will apply unless the driver presents evidence which, *if believed,* "would support a finding of [the] nonexistence of" the presumed fact. This plain meaning of the statutory language is supported by the Assembly Committee on Judiciary's comment on section 604, which states: "Such a presumption is merely a preliminary assumption in the absence of contrary evidence, *i.e.,* evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received." (Assem. Com. on Judiciary com., reprinted at 29B pt. 2, West's Ann. Evid.Code (1995 ed.) foll. § 604, p. 59.)

*****548** ***1211** Viewing the presumption in section 23152, subdivision (b) in this way, and assuming without deciding that it applies in administrative per se proceedings, [10] we find Williams's testimony was sufficient to rebut the presumption that plaintiff's BAC was at least 0.08 percent at the time she was driving. Williams was qualified as an expert in the field and his testimony was clear and direct. If believed, his evidence would have justified a conclusion that plaintiff's BAC was rising at the time of her chemical tests and was thus quite possibly below the 0.08 percent threshold at the time she had been driving. As a consequence, the DMV was required to prove plaintiff's BAC at the time she was driving without resort to the statutory presumption.

C. The Circumstantial Evidence of Plaintiff's Intoxication Was Relevant and Thus Admissible

Having found the statutory presumption in section 23152, subdivision (b), even if applicable, does not control this case, we turn to the main issue presented here: Did the DMV hearing officer properly admit and consider non-chemical-test evidence to reach her conclusion that plaintiff was driving with at least a 0.08 percent BAC? [11]

The crime of drunk driving is set forth in section 23152 and can be established in two ways: Subdivision (a) states that "[i]t is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle." To prove a violation under subdivision (a), the People must present evidence the driver's alcohol consumption impaired his or her ability to drive. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1197, 96 Cal.Rptr.3d 261, 210 P.3d 420.) Subdivision (b) offers an alternative method of proof; it states that "[i]t is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." To prove a ****905** criminal violation under subdivision (b), the People need not prove the accused's driving ability was impaired or diminished, but only that the driver's BAC reached or exceeded the prohibited level at the time the accused was driving.

***1212** The administrative per se law's license suspension provision, although not a criminal matter, is linked to the second prong of section 23152. [12] Thus, license suspension under the administrative per se *****549** law does not require proof of a person's impairment to safely operate a motor vehicle due to alcohol consumption, but only that the person's BAC level was 0.08 percent or more. Section 13382, subdivision (a) provides in pertinent part: "*If the chemical test results* for a person who has been arrested for a violation of Section 23152 or 23153 show that the person *has 0.08 percent or more,* by weight, of alcohol in the person's blood, ... the peace officer, acting on behalf of the [DMV], shall serve a notice of order of suspension or revocation of the person's privilege to operate a motor vehicle personally on the arrested person." (Italics added.) In this case, the DMV presented the results of four chemical tests showing plaintiff's BAC was at or above 0.08 percent. Given the presentation of

these facially qualifying chemical test results, did the hearing officer abuse her discretion in concluding that non-chemical-test evidence was relevant and thus admissible to bolster or corroborate the chemical test results?

Plaintiff argues reliance on the non-chemical-test circumstantial evidence was improper because such evidence cannot by itself establish whether her BAC was 0.08 percent, higher than 0.08 percent, or lower than that level. She cites to scientific evidence showing that physical manifestations of alcohol intoxication can occur at levels much lower than a BAC of 0.08 percent and that observable physical symptoms correlate poorly to actual BAC levels. She also argues that one study has shown that poor performance on field sobriety tests has a low correlation to whether a driver's BAC is over 0.08 percent. (Hlastala, Polissar & Oberman, *Statistical Evaluation of Standardized Filed Sobriety Tests* (May 2005) 50 J. Forensic Science, No. 3, p. 662.)

Unmentioned is that some studies have reached a contrary conclusion. For example, the National Highway Traffic Safety Administration (NHTSA) released the results of a study in 1998 that evaluated the accuracy of the standardized field sobriety test (SFST) battery at BACs below 0.10 percent. (Stuster and Burns, Final Rep. to NHTSA, Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent (1998).) The NHTSA's study found that the battery of SFSTs, which includes three of the tests ***1213** administered to plaintiff (the horizontal gaze nystagmus test, the "walk-and-turn test," and the "one-leg stand test"), when administered by a trained officer, are "*extremely accurate in discriminating between BACs above and below 0.08 percent.*" (*Id.,* at p. v, italics added.) The NHTSA's report expressly dispelled a common misapprehension "that field sobriety tests are designed to measure driving impairment." (*Id.,* at p. 28.) According to the NHTSA, the SFST battery is instead designed specifically to "provide statistically valid and reliable indications of a driver's BAC, rather than indications of driving impairment."

We are not here attempting to resolve the scientific debate over the use of SFSTs to predict BAC. As plaintiff acknowledges, the test for admissibility of evidence is not a strict one: As a general matter, evidence may be admitted if relevant (Evid.Code, § 350), and " '[r]elevant evidence' means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination ****906** of the action" (*id.,* § 210). " ' "The test of relevance is whether the evidence tends, 'logically, naturally, and by reasonable inference' to establish material facts...." ' " (*People v. Wilson* (2006) 38 Cal.4th 1237, 1245, 45 Cal.Rptr.3d 73, 136 P.3d 864.) "The trial court has broad discretion to determine the relevance of evidence [citation], and we will not disturb the court's exercise of that *****550** discretion unless it acted in an arbitrary, capricious or patently absurd manner." (*People v. Jones* (2013) 57 Cal.4th 899, 947, 161 Cal.Rptr.3d 295, 306 P.3d 1136.)

Past cases applying this standard have found circumstantial evidence of intoxication may be admissible when later-administered chemical tests show a BAC exceeding the legal limit. In *Burg v. Municipal Court, supra,* 35 Cal.3d 257, 198 Cal.Rptr. 145, 673 P.2d 732 (*Burg*), decided at a time when the BAC threshold for drunk driving was 0.10 percent, [13] we explained that the crime of drunk driving set forth in section 23152, subdivision (b) "prohibits driving a vehicle with a blood-alcohol level of 0.10 percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of 0.10 percent or more. *Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute.* A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. (*People v. Lewis* (1983) 148 Cal.App.3d 614, 620, 196 Cal.Rptr. 161; accord, *Fuenning v. Superior Court* (Ariz.1983) [139 Ariz. 590] 680 P.2d 121, 127 ... [rejecting argument that analogous statute ***1214** represents 'substitution of a machine test result for a jury verdict' because defendant is given an opportunity to challenge accuracy of test result, and state must prove beyond a reasonable doubt that defendant's blood-alcohol level was 0.10 percent at the time he was driving]; *Cooley v. Municipality [of] Anchorage* (Alaska App.1982) 649 P.2d 251, 254–255.) *Of course, both parties may also adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood-alcohol level while driving.* (See, e.g., *Fuenning, supra,* at p. 130.)" (*Burg, supra,* at p. 266, fn. 10, 198 Cal.Rptr. 145, 673 P.2d 732, italics added.)

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Plaintiff would distinguish *Burg, supra,* 35 Cal.3d 257, 198 Cal.Rptr. 145, 673 P.2d 732, as a case involving a criminal drunk driving prosecution, not an administrative per se matter, but if non-chemical-test circumstantial evidence of intoxication may be admissible in a criminal case where the People's burden of proof is beyond a reasonable doubt, we see no reason why such evidence would be categorically inadmissible in an administrative proceeding where the People's burden of proof is only a preponderance of the evidence. Decisions in the Courts of Appeal support this conclusion. Thus, in *McKinney v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 519, 7 Cal.Rptr.2d 18, the Court of Appeal considered whether sufficient evidence supported the suspension of a driver's license under the administrative per se law. Citing *Burg,* the *McKinney* court noted that administration of a chemical test (blood, breath or urine) "is not the only means of establishing that a driver's [BAC] was .08 or more. [¶] ... [B]oth parties are free to introduce circumstantial evidence bearing on whether the driver's [BAC] exceeded the permissible level. [Citation.] 'Evidence regarding the manner in which a defendant drove, performed field sobriety tests, and behaved is *admissible and relevant* as tending to establish that he did or did not have a 0.10 [now 0.08] [BAC] while driving.' " (*McKinney,* at p. 526, fn. 6, 7 Cal.Rptr.2d 18; see *****551** *Jackson v. Department of Motor Vehicles, supra,* 22 Cal.App.4th at p. 741, 27 Cal.Rptr.2d 712 ["circumstantial evidence other than chemical test results may properly be admitted to establish a driver had the proscribed level of blood-alcohol at the time of the offense"]; *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 7, 262 Cal.Rptr. 378 [same].)

****907** Plaintiff argues *Burg, supra,* 35 Cal.3d 257, 198 Cal.Rptr. 145, 673 P.2d 732, is unpersuasive because, apart from the single sentence referencing non-chemical-test circumstantial evidence, the opinion does not elaborate on the use of such evidence to prove a driver's BAC. But *Burg's* citation to *Fuenning v. Superior Court, supra,* 139 Ariz. 590, 680 P.2d 121 (*Fuenning*), following that sentence is significant. [14] In that case, a person charged with drunk driving argued that circumstantial ***1215** evidence "regarding the manner in which he was driving, [and] the manner in which he performed the field sobriety tests," while relevant to the issue of whether he drove under the influence of alcohol, was "irrelevant to the question of whether he ... [was] driving with a .10% or greater BAC." (*Fuenning, supra,* at p. 599, 680 P.2d 121.) The Supreme Court of Arizona rejected the argument, explaining the evidence was relevant and thus admissible: "We agree with defendant that the only ultimate issue is whether defendant had a BAC of .10% or greater. In each case in which a violation of [the .10 percent BAC law] is charged, the state will present evidence of the test and the issue will be whether the test results were an accurate measurement of the defendant's BAC at the time of arrest. Typically, defendants will attack the margin of error, the conversion rate, the calibration of the test instrument, the technique used by the operator, the absorption and detoxification factors, etc. *Evidence of defendant's conduct and behavior—good or bad—will be relevant to the jury's determination of whether the test results are an accurate measurement of alcohol concentration at the time of the conduct charged.* For instance, the test in the case at bench was given several hours after the arrest and showed a .11% BAC. Defendant attacked the results, presenting evidence regarding margin of error, time lapse and other factors. Such evidence might raise considerable doubt whether the test result of .11% indicated .10% or greater BAC at the time defendant was arrested. *Evidence that at that time the person charged smelled strongly of alcohol, was unable to stand without help, suffered from nausea, dizziness or any of the other 'symptoms' of intoxication would justify an inference that a test administered some time after arrest probably produced lower readings than that which would have been produced had the test been administered at the moment of arrest.* The converse is also true. Evidence that at the time of arrest defendant was in perfect control, displayed none of the symptoms of intoxication and had not driven in an erratic manner, is relevant to show that a reading of .11% from a test given some time later does not prove beyond a reasonable doubt that the defendant was driving with a .10% or greater BAC at the time of his arrest. Such evidence has been held admissible. [Citations.] Again, evidence is admissible when it is relevant." (*Fuenning, supra,* at p. 599, 680 P.2d 121, italics added.)

Plaintiff argues *Fuenning* is neither controlling nor even on point because it did *****552** not address the issue before us in the instant case. Although *Fuenning* is an Arizona case and thus admittedly not controlling here (see *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1018, 47 Cal.Rptr.2d 478, 906 P.2d 440), it persuasively explains why circumstantial evidence of intoxication, while not dispositive, may be relevant and thus admissible [15] to help interpret the results

of a chemical test for a driver's BAC. Moreover, because the Legislature has prohibited driving with a BAC of 0.08 percent or ***1216** higher, that being the threshold at which a person cannot safely operate a motor vehicle due to alcohol consumption, circumstantial evidence that plaintiff was weaving erratically all over the roadway, smelled strongly of alcohol, and failed a battery of field sobriety tests may bolster chemical test results showing that she had attained or exceeded that BAC level.

****908** The administrative per se scheme in section 13382 is triggered by a chemical test result showing a BAC of 0.08 percent or more, and we do not here confront a case in which the DMV failed to present such test results; indeed, the DMV produced the results of *four* such tests. In other words, neither the DMV hearing officer nor the trial court considered circumstantial evidence of intoxication in the absence of any chemical test results. Although we find non-chemical-test evidence of plaintiff's intoxication may be relevant and thus admissible in the typical administrative per se proceeding triggered by a BAC of 0.08 percent or more to help connect those test results to a driver's BAC at the time she was driving (subject, of course, to the hearing officer's routine exercise of discretion), we would in any event affirm the hearing officer's decision in this case because the non-chemical-test evidence was admissible to rebut plaintiff's proffered defense that her BAC was low at the time she was driving and only later rose to exceed the legal limit. Her expert, Jay Williams, testified that, in his opinion, the four chemical test results indicated plaintiff's BAC was rising at the time of the tests; from that supposition, he further deduced that plaintiff's BAC was below the 0.08 percent threshold at the time she was driving. Even assuming that non-chemical-test evidence cannot *by itself* prove a driver's exact BAC at the moment the driver is stopped by a police officer, in this case plaintiff's erratic driving, outward appearance of substantial intoxication, implausible story of having just turned 21 years old, and was coming from a bar without having imbibed alcohol at all, and her failure on multiple field sobriety tests, together tend to rebut Williams's theory of a rising BAC and corroborate the BAC test results. For example, plaintiff's extremely erratic driving, observed by Sergeant Martin from before the moment he first made contact with her, suggests she was quite intoxicated from that early point in the timeline and tends to refute the expert's speculation that her BAC was low at the time she was driving, but rose to 0.08 percent and above only after she was stopped. Whether the circumstantial evidence of plaintiff's intoxication was admitted to bolster the results of the chemical tests or merely to rebut plaintiff's defense of a rising BAC, the hearing officer did not act in “an arbitrary, capricious or patently absurd manner” and thus did not abuse her broad discretion. (*People v. Jones, supra,* 57 Cal.4th at p. 947, 161 Cal.Rptr.3d 295, 306 P.3d 1136.)

*****553** *Brenner v. Department of Motor Vehicles* (2010) 189 Cal.App.4th 365, 116 Cal.Rptr.3d 716, cited by plaintiff, does not warrant a contrary result. In that case, an expert examined the maintenance records for the device used to measure the driver's breath and opined that it produced ***1217** slightly elevated results. As the driver's test results showed a BAC of 0.08 percent exactly, the expert opined the driver's actual BAC was slightly below the legal limit. Because the trial court in *Brenner* had *granted* the driver's petition for a writ, the Court of Appeal was required to uphold that decision if supported by substantial evidence. By contrast, the instant case comes to us in the opposite procedural posture: the trial court here *denied* relief to plaintiff and we are bound to uphold *that* decision if supported by substantial evidence. To the extent the appellate court in *Brenner* asserted that “the impressions of the officer may have a bearing on plaintiff's level of impairment, [but] they have no bearing on the precise level of his BAC” (*id.* at p. 373, 116 Cal.Rptr.3d 716), the statement must be read in the context of the case: Because the chemical tests in *Brenner* were done on a miscalibrated device used to measure the BAC in a breath sample, no accurate chemical test results were presented. No such problem exists in the instant case; the DMV presented the results of four chemical tests and, although plaintiff's expert would have interpreted those results to conclude her BAC was rising, he did not testify they inaccurately measured her BAC at the time the tests were run. To the extent the court's statement in *Brenner v. Department of Motor Vehicles, supra,* 189 Cal.App.4th 365, 116 Cal.Rptr.3d 716, may be taken to preclude consideration of non-chemical-test evidence to bolster or corroborate chemical test results, we disapprove it.

****909** Having concluded the DMV hearing officer properly admitted the circumstantial, nontest evidence of plaintiff's intoxication, we also conclude substantial evidence supported the trial court's decision to deny writ relief, thereby sustaining the DMV hearing officer's decision to suspend plaintiff's license to drive. A driver whose license has been suspended under the administrative per se law can seek review of the DMV's decision by seeking a writ of mandate in the trial court. “In ruling on an application for a writ of mandate following an order of suspension or revocation, a trial court is required to determine,

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based on its independent judgment, ‘ “whether the weight of the evidence supported the administrative decision.” ’ ” (*Lake, supra,* 16 Cal.4th at p. 456, 65 Cal.Rptr.2d 860, 940 P.2d 311.) Following the trial court's denial of the writ, the scope of our review on appeal is limited: “[W]e ‘need only review the record to determine whether the trial court's findings are supported by substantial evidence.’ [Citation.] ‘ “We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings.” ’ ” (*Lake, supra,* at p. 457, 65 Cal.Rptr.2d 860, 940 P.2d 311.)

Applying this standard, we have no trouble concluding substantial evidence supported the trial court's ruling, for it acted well within its ***1218** discretion in rejecting the expert's testimony and placing primary emphasis on the four chemical tests that showed plaintiff's BAC met or exceeded the statutory threshold at the time plaintiff was driving. Neither the DMV hearing officer nor the trial court was required to accept Williams's testimony at face value. *****554** (*People v. Prince* (1988) 203 Cal.App.3d 848, 858, 250 Cal.Rptr. 154 [trier of fact “is permitted to consider the credibility of the expert witnesses, the reasons given for their opinions, and the facts and other matters upon which their opinions are based”]; cf. CALCRIM No. 332 [instructing the jury it is not required to accept a proffered expert opinion as “true or correct”].) Both reasonably relied on circumstantial evidence of plaintiff's intoxication—her general appearance, the odor of alcohol about her person, her erratic driving, and her failed field sobriety tests—to support the accuracy of the chemical test results and to reject Williams's view of the evidence, including his opinion of a rising BAC, as unduly speculative.

CONCLUSION

The judgment of the Court of Appeal is affirmed.

We Concur: CANTIL–SAKAUYE, C.J., CHIN, CORRIGAN, CUÉLLAR, and KRUGER, JJ.

Concurring Opinion by LIU, J.
I write separately to clarify the limited way in which evidence of behavioral impairment was relevant in this case to determining whether the driver's blood-alcohol concentration (BAC) was 0.08 percent or higher at the time of arrest.

“ ‘Relevant evidence’ means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid.Code, § 210.) Evidence that a driver's behavior is not impaired tends to prove that her BAC was below 0.08 percent because we can rationally surmise, given the Legislature's choice of the 0.08 percent BAC threshold, that a BAC of 0.08 percent is associated with an unsafe degree of impairment. But the converse is not true. Absent foundational evidence, a driver's impairment does not generally tend to show that her BAC was 0.08 percent or higher because we have no way of correlating a specific type or degree of impairment with a particular BAC in a close case. The fact that 0.08 percent BAC is a threshold associated with an unsafe degree of impairment does not imply that no impairment occurs *below that threshold.* Without evidence that correlates particular behavioral impairments with particular BAC levels, signs of impairment do not generally establish that it is more likely a driver's BAC ****910** is 0.08 percent as opposed to 0.06 or 0.07 percent. In other words, signs of impairment do not generally have a tendency in reason to prove a BAC of 0.08 percent or greater.

***1219** I say “generally” because sometimes evidence of impairment can be so extreme—for example, if the driver passed out at the scene of arrest—that the trier of fact may infer on the basis of common experience that the driver likely was driving with a BAC of 0.08 percent or higher. But there is no evidence of such extreme impairment in this case.

Today's opinion properly refrains from suggesting that there is a correlation between evidence of impairment, including field sobriety test results, and a BAC of 0.08 percent or greater. The court cites a study commissioned by the National Highway Traffic Safety Administration (NHTSA) reporting that at least some field sobriety tests, properly administered, may accurately measure a BAC of 0.08 percent or greater. (Stuster and Burns, Final Rep. to NHTSA, Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent (1998) p. v.) But today's opinion is careful to express no view about the merits of these claims (maj. opn., *ante,* 185 Cal.Rptr.3d at p. 549, 345 P.3d at p. 905), and other courts have *****555** questioned them. In *United States v. Horn* (D.Md.2002) 185 F.Supp.2d 530, for example, the court undertook an extensive review of expert testimony and academic literature critiquing an earlier NHTSA study and concluded that “presently there is insufficient data to support these claims of accuracy” of field sobriety tests in predicting BAC. (*Id.* at p. 556.)

This lack of correlation between evidence of impairment and BAC does not mean that such evidence is always irrelevant. As the New Mexico Supreme Court has explained, “behavioral evidence by itself cannot be sufficient to show the required nexus between a BAC test and an earlier BAC. It may, however, have limited relevance when the factors that underlie the shape of the concentration time curve [showing the level of alcohol absorption over time] are subject to conflicting testimony.” (*State v. Day* (2008) 143 N.M. 359, 176 P.3d 1091, 1100.)

That is precisely how such evidence is relevant in this case. The results of the four tests of Ashley Coffey's BAC indicated that it was rising, and the parties offer competing explanations. Coffey argues that her BAC was in fact rising and that her BAC must have been below 0.08 percent at the time of her arrest. By contrast, the Attorney General attributes the rising BAC test results to the test's margin of error (which would explain the 0.01 percent rise within three minutes between the first and second breath tests) and to the fact that the last two tests were blood tests rather than breath tests and thus produced slightly different results. The Attorney General asserts that the testimony of Coffey's expert, Jay Williams, lacked key findings to support a rising BAC theory, such as when Coffey had her last drink before getting behind the wheel, her food intake, her weight, and other factors. As the Department of Motor Vehicles (DMV) hearing officer concluded, Williams did not show that other experts in the scientific community had reached similar conclusions based on facts similar to those in this record.

***1220** Evidence of Coffey's impairment was relevant to deciding which theory of rising BAC was more likely correct. Such evidence was relevant in the following limited sense: The fact that Coffey did show signs of impairment made her theory of rising BAC weaker than if Coffey had *not* shown signs of impairment at the time of her arrest. (See maj. opn., *ante,* 185 Cal.Rptr.3d at p. 552, 345 P.3d at p. 907 [“[T]he non-chemical-test evidence was admissible to rebut plaintiff's proffered defense that her BAC was low at the time she was driving and only later rose to exceed the legal limit.”].) This point, on which all members of the court agree, renders unnecessary any broader suggestion that in a typical administrative per se proceeding, evidence of a driver's impairment tends to prove a BAC level of 0.08 percent or higher at the time of arrest. Here the evidence of Coffey's impairment was, like the other weaknesses in the expert's testimony discussed above, relevant to the DMV hearing officer's conclusion that the rising BAC theory was “too speculative.”

****911** Because the evidence of Coffey's impairment was relevant in the limited way just described, and because the evidence is sufficient to support the determinations of the DMV hearing officer and the trial court that Coffey drove with a BAC at or above 0.08 percent, I concur in the judgment.

All Citations

60 Cal.4th 1198, 345 P.3d 896, 185 Cal.Rptr.3d 538, 15 Cal. Daily Op. Serv. 3366, 2015 Daily Journal D.A.R. 3840

Footnotes

1 All statutory references are to the Vehicle Code unless otherwise stated.

2 " 'Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotary. [Citation.] An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. [Citation.] Some investigators believe alcohol intoxication increases the frequency and amplitude of HGN and causes HGN to occur at a smaller angle of deviation from the forward direction.' " (*People v. Leahy* (1994) 8 Cal.4th 587, 592, 34 Cal.Rptr.2d 663, 882 P.2d 321.)

3 The " 'walk-and-turn test' " is significant because it tests " 'many of the same skills needed for driving,' such as small muscle control, information processing, reaction, balance, coordination, and short-term memory." (*U.S. v. Stanton* (9th Cir.2007) 501 F.3d 1093, 1100.)

"Officers administering the Walk–and–Turn test observe the suspect's performance for eight clues:

"• can't balance during instructions;

"• starts too soon;

"• stops while walking;

"• doesn't touch heel-to-toe;

"• steps off line;

"• uses arms to balance;

"• loses balance on turn or turns incorrectly; and,

"• takes the wrong number of steps."

(Utah Prosecution Council, Driving Under the Influence Prosecution Manual (2007) ch. 8, p. 8 < http://www.justice.state.ut.us/Documents/Sentencing/ProsecutionManual/chapter8.pdf> [as of April 6, 2015] (Utah Prosecution Manual).) "Original research shows that if a suspect exhibits two or more of the clues, or cannot complete the test, the suspect's BAC is likely to be above 0.10 [percent]. This criterion has been shown to be accurate 68 percent of the time." (*Ibid.*)

4 In the "one-leg stand" test, after listening to the instructions, "the subject must raise one leg, either leg, with the foot approximately six inches off the ground, keeping raised foot parallel to the ground. While looking at the elevated foot, count out loud in the following manner:

" '[O]ne thousand and one', 'one thousand and two', 'one thousand and three' until told to stop. This divides the subject's attention between balancing (standing on one foot) and small muscle control (counting out loud).

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"The timing for a thirty-second period by the officer is an important part of the One–Leg Stand test. The original research has shown that many impaired subjects are able to stand on one leg for up to 25 seconds, but that few can do so for 30 seconds.

"One–Leg Stand is also administered and interpreted in a standardized manner. Officers carefully observe the suspect's performance and look for four specific clues:

"• sways while balancing;

"• uses arms to balance;

"• hops;

"• puts foot down.

"Inability to complete the One–Leg Stand test occurs when the suspect:

"• puts the foot down three or more times, during the 30–second period;

"• cannot do the test.

"The original research shows that, when the suspect produces two or more clues or is unable to complete the test, it is likely that the BAC is above 0.10 [percent]. This criterion has been shown to be accurate 65 percent of the time." (Utah Prosecution Manual, *supra,* ch. 8, at pp. 8–9 < http://www.justice.state.ut.us/Documents/Sentencing/ProsecutionManual/chapter8.pdf> [as of April 6, 2015].)

5 In the Romberg test, the driver is "asked to stand at attention, close his eyes, tilt his head back, and estimate the passage of 30 seconds." (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 33, 140 Cal.Rptr.3d 80.) The officer observes the driver's "balance and his ability to accurately measure the passage of 30 seconds." (*Ibid.*)

6 Pursuant to section 23612, subdivision (h), a PAS is an investigative tool used to determine whether there is reasonable cause for arrest. "[A] preliminary test is 'distinguished from the chemical testing of a driver's blood, breath or urine contemplated by the implied consent law [citation] which is administered after the driver is arrested, [and is] sometimes referred to as "evidentiary" [or evidential] testing.' " (*People v. Vangelder* (2013) 58 Cal.4th 1, 5, fn. 1, 164 Cal.Rptr.3d 522, 312 P.3d 1045.)

7 "A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153." (§ 23612, subd. (a)(1)(A).) "The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and ... suspension or revocation of the person's privilege to operate a motor vehicle...." (§ 23612, subd. (a)(1)(D).)

8 Evidence Code section 664 provides in part: "It is presumed that official duty has been regularly performed." Applied in this context, "Evidence Code section 664 creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines of [Cal.Code Regs.] title 17. [Citations.] Test results from authorized laboratories, performed by public employees within the scope of their duties, are admissible under the public employee records exception to the hearsay rule. [Citations.] The recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence. [Citation.] At this point, 'faced with

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a report of chemical test results, the burden would be on the licensee to demonstrate that the test was not properly performed.' " (*Shannon v. Gourley* (2002) 103 Cal.App.4th 60, 64–65, 126 Cal.Rptr.2d 327.)

9 Somewhat different rules apply to those under 21 years of age (§ 13557, subd. (b)(3)(C)(ii)), those driving commercial vehicles (*id.,* subd. (b)(3)(C)(iv)), and those on probation for prior drunk driving convictions (*id.,* subd. (b)(3)(C)(v)).

10 The Legislature might in the future wish to clarify whether it intends that the evidentiary presumption in section 23152 applies in administrative per se proceedings as well as in "prosecutions."

11 Plaintiff notes the DMV hearing officer failed to submit to cross-examination so that it might be determined how she used the circumstantial evidence to reach her conclusion to reject the testimony of expert witness Jay Williams. This failure, she argues, violated her right to due process of law. Although it seems extremely dubious that plaintiff's due process rights require the hearing officer to testify and submit to plaintiff's cross-examination, the record in any event reveals no objection on this ground or request that the officer testify. Accordingly, plaintiff forfeited this claim.

12 We are not here concerned with the less typical administrative per se provisions applicable to underage or commercial drivers, or those on probation for drunk driving (see §§ 13353.2, subd. (a)(2) [person under 21 years old with a BAC of 0.01 percent or greater], 13353.2, subd. (a)(3) [person driving a vehicle requiring a commercial driver's license with a BAC of 0.04 percent or greater], 13353.2, subd. (a)(4) [person on probation for drunk driving with a BAC of 0.01 percent or greater]), or to adults who refuse to submit to, or complete, a chemical test as requested by a law enforcement officer (§ 13353) or to underage drivers (§ 13388) or adults on probation for drunk driving (§ 13389) who refuse to submit to a preliminary alcohol screening (§ 13353.1, subd. (a)).

13 See former section 23152, subdivision (b), as amended by Statutes 1982, chapter 1337, section 1, page 4961. The administrative per se law was enacted several years later in 1998. (See Stats.1998, ch. 118, § 4, pp. 757–758.)

14 *Fuenning* was later superseded by statute on a different point of law. (See *State ex rel. McDougall v. Superior Court in and for County of Maricopa* (1995) 181 Ariz. 202, 205–206, 888 P.2d 1389, 1392–1393.) This subsequent history does not affect *Fuenning's* discussion of the admissibility of circumstantial evidence of intoxication.

15 To the extent plaintiff argues *Fuenning, supra,* 139 Ariz. 590, 680 P.2d 121, did not address the admissibility issue, she is simply incorrect.

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KeyCite Red-Striped Flag - Overruled in Part
Disapproved of by Meinhardt v. City of Sunnyvale, Cal., July 29, 2024

49 Cal.App.5th 618
Court of Appeal, First District, Division 2, California.

VALERO REFINING COMPANY – CALIFORNIA, Plaintiff and Respondent,
v.
BAY AREA AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD et al., Defendants and Appellants.

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Filed 5/27/2020

Synopsis

Background: Oil refinery filed petition for writ of administrative mandamus challenging denial by regional air quality management district of its request to bank emissions reductions resulting from facility upgrades as environmental credits. The Superior Court, San Francisco County, No. CPF-15514407, Harold Kahn, J., granted writ to set aside air district hearing board's decision. Air district appealed.

Holdings: The Court of Appeal, Stewart, J., held that:

as a matter of first impression, trial court's mailing of notice of judgment to counsel's former address did not trigger deadline for bringing appeal;

hearing board was not authorized to review whether applying regulations to oil refinery would be fundamentally fair; and

hearing board properly applied procedural rule governing scope of review of air pollution control officer (APCO) decision.

Reversed.

Procedural Posture(s): On Appeal; Review of Administrative Decision; Petition for Writ of Mandate.

****888** San Francisco County Superior Court, Hon. Harold E. Kahn, Judge (San Francisco County Super. Ct. No. CPF-15514407)

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Opinion

STEWART, J.

***624** An oil refinery, respondent Valero Refining Company California (Valero), undertook a costly, three-year construction project both to comply with a consent decree it entered into with the federal government and to upgrade portions of its facility. The project resulted in a significant reduction in air pollution, and after constructing it Valero sought approval from the regional air quality management district to bank the resulting emissions reductions as valuable environmental credits. It was denied a significant portion of the requested credits—first by the agency official charged with deciding the issue, and then by the hearing board to which it appealed. In this administrative mandamus action, it asked the superior court to set aside the hearing board's decision. The superior court did so, remanded the case back to the hearing board for reconsideration, and the air district has appealed.

The sole issue raised in this appeal concerns the standard of review that the air district's hearing board must apply when reviewing the agency official's decision denying approval of such emission reduction credits. Here, the agency official charged with considering the refinery's banking application in the first instance denied the credits in question because, applying a local air district regulation that prescribes the methodology for measuring emissions reductions, the official calculated a significantly lower reduction in air pollution than the refinery calculated. The refinery then appealed the official's decision to the hearing board, which upheld the official's interpretation of the regulation and on that basis declined to disturb the official's decision. The superior court ruled the hearing board did not apply the correct standard of review in deciding the refinery's appeal, because the hearing board erroneously declined to consider evidence that denial of the refinery's banking application was "unfair" under the circumstances.

We hold the air district hearing board's standard of review neither requires nor empowers it to consider whether applying the regulation to the particular case before it is in some broad sense fair, but instead is limited to a quasi-judicial inquiry entailing the exercise of its independent judgment to decide if the agency official's interpretation of that regulation was correct. ****889** The hearing board could, and did, appropriately consider Valero's evidence regarding the fairness of applying the regulation to Valero, but in another context: in addressing Valero's claim that the air district was equitably estopped from applying it here. The superior court erred in construing the ***625** hearing board's standard of review to permit, and indeed require, the hearing board to consider some other, more amorphous concept of "fairness." Accordingly, we reverse and remand the case to the trial court to address the issues it did not reach, which we will not decide in the first instance on appeal.

BACKGROUND

A. The Regulatory Framework

In California, regulatory oversight over sources of air pollution is divided between the State Air Resources Board which has exclusive control over emissions from motor vehicles, and 35 local and regional air quality management districts (air districts) which have primary responsibility for the control of air pollution from all other sources. (See Health & Saf. Code, [1] §§ 39002, 39003, 39500, 40000; *Friends of Outlet Creek v. Mendocino County Air Quality Management Dist* (2017) 11 Cal. App. 5th 1235, 1239, fn. 4, 218 Cal.Rptr.3d 212.) This case, involving emissions from an oil refinery, concerns the scope of regulatory powers and duties at the air district level.

"Subject to the powers and duties of the state board," air districts are empowered to "adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law." (§ 40001, subd. (a).)

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The regulatory powers and duties of air districts are carried out at three levels. Each air district has a governing board, composed of locally elected officials, which adopts substantive rules and regulations through a public hearing process. (See §§ 40704.5, 40725, subd. (a), 40726.) The governing board also appoints an air pollution control officer for the district, commonly referred to in regulatory parlance as the "APCO." (§ 40750.) The APCO possesses broad enforcement authority, with responsibility for enforcing "[a]ll orders, regulations, and rules prescribed by the district board." (§ 40752.) The governing board also appoints a five-member hearing board, comprised of two members of the public and three professionals (one lawyer, one engineer and one medical expert with specialty in environmental medicine or related fields).[2] (§§ 40800, 40801.) The hearing board serves a hybrid function; it sits in a reviewing capacity in some types of cases (permit disputes (see §§ 42302.1 [issuance], 42302 [denial], 42306 [suspension], 42307 [revocation]) and appeals of emissions reduction credit banking decisions (§ 40713)) and it presides over other types of matters directly in the first ***626** instance, in a nonreviewing capacity (see §§ 42350, subd. (a) [variance applications], 42451, subd. (a) [abatement proceedings]). It is empowered to hold public hearings (§ 40808), subpoena witnesses (§ 40840) and "adopt rules for the conduct of its hearings" (§ 40807). Its decisions may be judicially reviewed by petition for a writ of mandate under Code of Civil Procedure section 1094.5. (§ 40864.)

Section 40709 requires each air district to adopt regulations establishing an air ****890** pollution emission offset system. (See § 40709.) Broadly described, an offset system enables owners of pollution sources who voluntarily reduce their air pollution emissions below the levels required by law to receive emission reduction credits (ERC), certified by the air district, that can be banked for future use or sold to other emission sources for profit. (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 603, 160 Cal.Rptr.3d 387, 304 P.3d 1052.)[3] Approval of emissions reductions through an offset system results in the issuance of a certificate evidencing the ownership of all approved reductions. (§ 40710.) Each air district offset system is subject to disapproval by the state board within 60 days of adoption. (§ 40709, subd. (a).)

The Legislature has prescribed two levels of agency action for regulatory approval of ERCs. Under section 40709, the initial decision rests with the APCO. (See § 40709, subd. (a) [emission reductions "shall be registered, certified, or otherwise approved by the district air pollution control officer before they may be banked"].) Pursuant to section 40713, if the APCO refuses to register, certify or otherwise approve an application for emission reductions under section 40709, the applicant may seek review of that decision by the district hearing board, which must hold a hearing to decide "whether the application was properly refused." (§ 40713.)

The underlying dispute here arose under regulations promulgated by the Bay Area Air Quality Management District (the air district) concerning the banking of ERCs, which we summarize briefly for context. The air district's regulations state that emissions reductions calculated in accordance with its ***627** specified methodology qualify as "emission reduction credit" if they exceed the reductions required by law, rule, regulation or the district's clean air plan. The regulations also specify that the reductions must be "real, permanent, quantifiable, and enforceable." Subject to exceptions not pertinent here, ERCs are then "bankable," meaning they can be deposited into the air district's "emissions bank."

The air district's regulations require an application to deposit an emission reduction in the district's emissions bank, on forms specified by the APCO. However, the regulations prohibit the submission of a banking application for pollutant sources that are subject to an abatement order or other similar formal order "until compliance with the emissions limitations which are the subject of the ... order is achieved."

The dispute in this case turned on the meaning of regulation 2-2-605.1, which specifies one aspect of the methodology for calculating ECMs. That regulation mandates the use of a "baseline period" to calculate emissions reductions that "consists of the 3 year period immediately preceding *the date that the* ****891** *application is complete*."[4] (Italics added.) The baseline period reflects the "before" input in what is essentially a "before and after" calculation mandated by the air district's regulations. In dispute here was the meaning of the phrase "the application." We will elaborate further below.

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B. These Proceedings

1. The Construction Project

In 2005, Valero entered into a consent decree with the United States Environmental Protection Agency to settle litigation charging it with violations of the Clean Air Act. The consent decree required Valero to take certain steps to reduce air pollution emissions at its refinery in Benicia, California, including installing some new equipment (a “scrubber,” to scrub one type of pollutant from its fluid coker).

At issue here are reductions in air pollution that resulted from a project that included both the equipment necessary to enable compliance with the consent decree and additional upgrades Valero decided to undertake voluntarily at the same time. As described by Valero, the project “was an integrated project” that included decommissioning two furnaces and their associated equipment and replacing them with two more efficient furnaces, a set of modern catalytic ***628** reduction beds and two flue gas scrubbers. According to Valero, about $500 million of its $750 million total outlay for the project was spent to achieve emissions reductions beyond those required by the consent decree. Valero opted to undertake greater than required improvements in order to modernize its refinery, expand its processing capability and make significant emissions reductions that it could use in the future.

In April 2008, Valero filed a permit application with the air district requesting authority to construct these improvements. [5] Under the air district's “New Source Review” regulations (Regulation 2, Rule 2), the purpose of that permit review process was to ensure that certain new or modified sources of air pollution would achieve no net increase in emissions. (See § 40919, subd. (a)(2).)

Valero's permit application expressly anticipated seeking approval of credit for the resulting emissions reductions. Its permit application (in section 7.0, entitled “Banking Credits”) stated that the project would result in a reduction in emissions and that “Valero will submit an application to bank ERCs from these reductions under separate cover.” The air district deemed the permit application to be complete on May 16, 2008. Subsequently, on December 15, 2008, the authority-to-construct permit issued.

On December 31, 2010, after two years of construction, Valero permanently shut down the two older furnaces, and about two months later, on February 23, 2011, the two new furnaces began operating. Over the next several months, Valero underwent mandatory emissions testing of the new equipment so the district could verify it complied with all permit limitations. ****892** The testing was completed and certified in September 2011.

2. The APCO's Decision on Valero's Banking Application

In order to satisfy the air district's requirement that emissions reductions be “real, permanent, verifiable and enforceable” to qualify as an ERC, Valero believed it could not submit a banking application until the old furnaces had been permanently shut down, the new ones had been built and tested and Valero had modified its federal operating permit. [6]

After the improvement project was operational, Valero submitted an application (in Mar 2012) to bank the resulting emissions reductions. In its ***629** banking application, Valero calculated its emissions reductions using the same baseline period it had used in its permit application: a three-year period ending in March 2008 (*before* it had performed the refinery upgrades), the date corresponding with its permit application. [7]

The air district had instructed Valero to use this baseline period in its permit application, [8] and it also was the same baseline period the air district used in engineering evaluations of the project it prepared in connection with Valero's permit application.

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The engineering evaluations had stated, "The baseline emissions shall be calculated in accordance with Regulation 2-2-605 [Basis: Banking]," which Valero had taken to mean that the same baseline period would be used to bank its emission reductions. The engineering evaluations also contained statements that led Valero to believe it could not submit a banking application until the project had been completed, [9] which was consistent with the district's regulation (2-4-401) that prohibits the submission of a banking application for pollutants that are the subject of a formal order such as the consent decree until after the emission limitations required by the order are achieved.

In November 2014, after lengthy wrangling with Valero, the APCO issued a final decision authorizing the banking of a significantly lower number of ERCs than Valero sought. Interpreting regulation 2-2-605.1 to require the use of a three-year baseline period ending on the date Valero's *banking application* was deemed complete (May 15, 2012), the APCO measured the reductions against a more recent baseline period (May 2009 to May 2012) than the period in Valero's banking application (Apr 2005 to Mar 2008). The more recent baseline period included the period after Valero had shut down its existing furnaces but not yet brought the new ones online (i.e., when no emissions were generated), and extended into the postproject period when its emissions were lower than ****893** they had been prior to construction of the project. In all, Valero argued that the more recent baseline period captured about 18 months of postchange emissions rather than reflecting three full years of pre-change emissions. As a result, Valero argued, this baseline period was not representative of Valero's prechange emissions, it understated the true level ***630** of emissions reductions Valero had achieved and using it to calculate Valero's emissions reductions for purposes of the banking application reduced the amount of ERCs Valero could receive.

3. Valero's Appeal to the Hearing Board

Valero appealed to the hearing board, and the matter proceeded to a five-day hearing at which both parties submitted prehearing briefs, presented evidence and argued.

Rule 3.6 of the hearing board rules (Rule 3.6) sets forth the board's standard of review, and the scope of this rule is the central issue in this appeal. It states: "The traditional legal presumption is one of the correctness of a regulatory agency's action. California Evidence Code Section 664 ('It is presumed that official duty has been regularly performed'). The Board may not readily substitute its judgment for that of the District's expertise. The Board's role is to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO and whether the APCO followed proper and appropriate procedures and guidelines. The burden of proof in an appeal is on the party challenging the APCO's action or finding. California Evidence Code Section 660. [¶] The scope of the Hearing Board's review is deference to the District's determination with the burden on the Appellant(s) to show the District's action was erroneous. Specifically, it is the Board's task to determine whether the agency's interpretation of its duty was reasonable and if its performance of that duty was regularly performed." (Rule 3.6.)

Valero argued the APCO's use of a baseline period ending on the completeness date of the banking application, rather than a preproject baseline ending in March 2008, was legally erroneous. It argued that the "application" date as used in regulation 2-2-605.1 meant the completion date for the application that made the emissions reductions *enforceable*: either the application seeking an authority-to-construct permit in cases (like this one) that required such a permit, and in all other cases (such as emissions reductions resulting only from a shutdown of equipment), the banking application itself.

Valero also asserted in its reply brief before the hearing board that, under the circumstances, the air district should be equitably estopped from using the banking application completeness date to set the baseline period. Specifically, it argued that the district "should not be permitted to assert a different position on the baseline [period] than the one it [applied to Valero's permit application] in part because Valero detrimentally relied on the District's statements and actions ...."

The APCO argued that the "application" date used in regulation 2-2-605.1 meant only the banking application and not some other one. It argued that the ***631** "declining baseline" that results when an applicant delays submitting its banking application

was adopted by design " 'to encourage applicants to complete their applications in a timely manner,' " and that the history of the current version of the rule reflected that intention. It also argued the plain language of the regulation supported its interpretation and the district's treatment of prior applications interpreted the regulation ****894** consistently to have the same meaning it was applying to Valero.

The APCO also addressed Valero's estoppel argument, both contending that it was not timely made and therefore was waived and opposing it on the merits. Valero responded to that procedural objection by invoking Rule 3.6 and contending the estoppel arguments in its reply brief were the same arguments it had previously advanced in its prehearing briefing about the hearing board's standard of review, just reframed.

After the five-day evidentiary hearing concluded, the hearing board by a divided 3-2 vote upheld the APCO's interpretation of the banking regulation and dismissed Valero's appeal. Applying Rule 3.6 in a 10-page written ruling, the hearing board concluded that "the APCO's interpretation of Regulation 2-2-605.1, and its application of that provision in this particular case, was fair and reasonable and consistent with other actions of the ACPO" and that the APCO "applied this interpretation fairly and consistently to Valero in the same manner as it has applied to other similarly-situated applicants seeking to bank emission reduction credits under similar circumstances." It reached this conclusion principally by examining the regulation's language, its regulatory context, evidence from various sources of the air district's intent and two prior instances in which the district had applied the regulation similarly.

The hearing board also rejected Valero's equitable estoppel theory. It did so principally on factual grounds, finding there was nothing in Valero's permit application, the engineering evaluations, the permit, its banking application or the banking decision itself that was "inconsistent with the APCO's position that the baseline period for the banking application is based on the date of the banking application itself." It rejected Valero's theory that Valero had relied on assurances by air district staff that the same baseline period would be used for both the permit application and the later banking application, observing that there was no evidence that Valero ever confirmed such an understanding in writing. "Furthermore," it stated, "the position of an individual Air District staff member does not bind the agency as a whole, especially in cases where such a position was not reflected in the actual permitting documents that District staff prepared, and where it was not the position that the APCO took in approving the ... permit application or banking application." It concluded that Valero had "not demonstrated that the APCO ever took an inconsistent position that would justify a conclusion that the APCO's position in this matter was unreasonable or otherwise improper."

***632** The hearing board was not entirely unsympathetic to Valero, however. It concluded its ruling with advisory suggestions "encourag[ing]" the air district both to "reconsider the fairness of denying banking credits under these circumstances" and to "make its interpretation of the baseline rules clear to the public and to regulated entities that may be affected by it." Quite presciently anticipating these proceedings, it also encouraged the parties to engage in settlement discussions.

4. The Superior Court's Ruling

Valero then filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 against the hearing board, the air district and the air district's APCO, Jack Broadbent (collectively, the "air district parties"). The first cause of action alleged the hearing board did not proceed in the manner required by law with respect to the proper standard of review. The second cause of action alleged ****895** the hearing board's ruling was not supported by the findings. And the third cause of action alleged the hearing board's findings were not supported by substantial evidence.

The superior court (the Hon. Harold E. Kahn) issued a writ of mandate, vacating the board's decision and remanding the matter for a new hearing. It ruled that the hearing board had prejudicially abused its discretion by not applying the correct standard of review under Rule 3.6. Specifically, it concluded that the hearing board had "improperly limited its consideration of Valero's appeal to the sole question of whether the APCO's interpretation of [regulation] 2-2-605.1 was reasonable." The court ruled that, "[r]ead as a whole and within the context of administrative law, Rule 3.6 quite clearly has its origins in and therefore should take

its meaning from the case law on the independent judgment standard of review," observing that the rule "incorporates all aspects of the independent judgment standard," including "the presumption of correctness of the APCO's decision, the exercise of the Board's own judgment not in a way that is in derogation of the presumption of correctness, and the Board's obligation to set aside the APCO's decision when the Board's own judgment shows that the APCO's decision was erroneous." It concluded that the hearing board "erred in determining that Rule 3.6 required it to dismiss Valero's appeal once it determined that the APCO's interpretation of [regulation] 2-2-605.1 was reasonable .... The Board's decision not to consider any of the facts adduced from the evidence received by the Board that persuaded all five members of the Board that the denial of Valero's application was *unfair* to Valero shows that, had the majority properly construed Rule 3.6, there is a significant possibility that one or more of the three persons who voted to dismiss Valero's appeal may have decided the appeal differently." (Italics added.) The superior court appears to have been addressing Valero's first cause of action and not to have reached Valero's second and third causes of action.

***633** This appeal by the air district parties then followed.

DISCUSSION

I.

Appellate Jurisdiction

Before turning to the merits of this appeal, we first address whether this appeal was timely filed and conclude that it was.

Under California Rules of Court rule 8.104 (rule 8.104), a 60-day deadline to appeal commences when "the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served," assuming (as is true here) that nothing has triggered an even earlier deadline. (Cal. Rules of Court, rule 8.104(a)(1)(A).) In this case, the air district parties filed their notice of appeal more than 60 days after the superior court clerk mailed the parties a file-stamped copy of the appealable judgment accompanied by a proof of service, and so we requested supplemental briefing concerning the appeal's timeliness. [10] (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 667, 125 Cal.Rptr. 757, 542 P.2d 1349 [if appeal is untimely " 'the court has no discretion but must dismiss the appeal of its own motion even if no objection ****896** is made' "]; Cal. Rules of Court, rule 8.104(b).)

The supplemental briefing disclosed that the superior court clerk's mailing was sent to an incorrect address. At the air district parties' request, we have taken judicial notice of the notice of change of address their counsel had filed in the superior court several months earlier. As now enlarged by that document, the record thus reveals that the superior clerk mailed the judgment to appellants' counsel's former address of record, not to counsel's current address of record.

Our research has revealed no authority addressing whether a clerk's mailing of notice of entry of judgment to counsel's former rather than current address of record commences the deadline to appeal under rule 8.104, but we have no hesitation concluding it does not.

Under rule 8.104, service "may be by any method permitted by the Code of ***634** Civil Procedure." (Cal. Rules of Court, rule 8.104(a)(2).). Code of Civil Procedure section 1013, which prescribes the requirements for valid mail service, requires papers to be addressed to "the office address *as last given by that person on any document filed in the cause.*" (Italics added.) That was not done here. After a notice of change of address has been filed with the court, as it was here, mail sent to a former address of record does not constitute proper service under section 1013. (See *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 510, 33 Cal.Rptr.2d 572 [notice of dismissal sent to prior address of record held ineffective]; see also *Gamet v. Blanchard* (2001)

91 Cal.App.4th 1276, 1286, 111 Cal.Rptr.2d 439 [trial court notices sent to address not specified in party's notice of change of address were "faulty" and "inadequate," rendering resulting judgment void].)

Because the clerk's notice of entry of judgment was not properly served, it did not satisfy rule 8.104. "[S]trict compliance" with Code of Civil Procedure section 1013 is required (*Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172, 174, 63 Cal.Rptr. 78), and therefore "[n]otice of an appealable judgment or order mailed to an incorrect address is not sufficient to constitute legal notice" for purposes of calculating the deadline to appeal. (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 288, 47 Cal.Rptr.3d 602 [notice of entry of judgment addressed with wrong zip code held ineffective]; see also *Triumph Precision Products, Inc. v. Insurance Co. v. Insurance Co. of North America* (1979) 91 Cal.App.3d 362, 365, 154 Cal.Rptr. 120 [notice of entry of judgment listing correct street address for appellant's counsel but omitting law firm name]; *Valley Vista Land Co.*, at pp. 173–174, 63 Cal.Rptr. 78 [notice of entry of judgment with incorrect street address].)

Citing dicta that notice of entry of judgment mailed to an incorrect address would trigger the 60-day deadline to appeal upon "proof notice was actually received" (*Moghaddam v. Bone*, *supra*, 142 Cal.App.4th at p. 288, 47 Cal.Rptr.3d 602 [construing Cal. Rules of Court, former rule 2]), Valero urges us to deem this appeal untimely because appellants *did* receive the clerk's mailing, a fact ultimately established by a declaration the air district parties filed with their reply supplemental briefing in order to clarify matters. [11] That ****897** is irrelevant, however. The fact remains that Rules of Court, rule 8.104 was not strictly complied with.

Although in other contexts, technical defects in giving notice are of no consequence where it can be inferred that notice was in fact received (see, ***635** e.g., *In re T.W.* (2011) 197 Cal.App.4th 723, 729-731, 128 Cal.Rptr.3d 373 [ZIP code omitted from notice of writ advisement under Welf. & Inst. Code, § 366.26(*l*)(3)]), actual notice that an appealable judgment has been entered, including by receiving a notice of entry of judgment or a file-stamped copy of the judgment, does not trigger the deadline to appeal when notice of entry of judgment has not been given in accordance with rule 8.104. Even trivial errors in giving notice of entry of judgment, which this was not, cannot be excused. [12] (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 903, 55 Cal.Rptr.3d 534, 152 P.3d 1109 ["the older rule that technical defects in a notice of entry of judgment are excusable unless they are so egregious as to preclude actual notice of entry [citation] has not been applied to ... rule 8.104(a)(1) ..."].) Our Supreme Court has made clear that rule 8.104 does not require litigants to "guess, at their peril" whether documents mailed by the court clerk trigger the deadline to appeal. (*Alan*, at p. 905, 55 Cal.Rptr.3d 534, 152 P.3d 1109.) " 'Neither parties nor appellate courts should be required to speculate about jurisdictional time limits.' " (*Ibid.*)

The issue here is one of first impression, but courts have held that other attempts to give notice of the entry of judgment that failed strictly to comply with rule 8.104 were ineffective to trigger the appeal deadline even in situations when the service clearly did result in actual notice to the appealing party of the entry of judgment. We are aware of no case reaching a contrary result. (See *InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 88 Cal.Rptr.3d 808 [electronic service of notice that judgment was entered, with instructions and hyperlink to electronic file-stamped copy of judgment held insufficient]; *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, 1164, 84 Cal.Rptr.3d 684 [similar]; see also *Thiara v. Pacific Coast Khalsa Diwan Society* (2010) 182 Cal.App.4th 51, 105 Cal.Rptr.3d 333 [judgment mailed with cover letter but no proof of service]; *Keisha W. v. Marvin M.* (2014) 229 Cal.App.4th 581, 585, 177 Cal.Rptr.3d 161 [personal service of restraining order but no evidence it was file-stamped]; *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 170 Cal.Rptr.3d 34 [appellant personally present in court when restraining order issued, making order legally enforceable, followed by court clerk handing written copy to appellant's counsel].) "Because appellate time limits are jurisdictional and cut off litigants' access to the courts, we strictly construe statutes and rules concerning the time in which to file a notice of appeal.

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[Citation.] 'On numerous occasions, California courts have resolved ambiguities concerning appellate jurisdictional time limits to extend, rather than limit, the right to appeal, even where such interpretations may be considered ****898** hypertechnical in other contexts.' " (*Lin*, at p. 474, 170 Cal.Rptr.3d 34.) Simply put, "mere ***636** knowledge" an appealable judgment has been entered is not sufficient to start the 60-day appeal period. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1102, fn. 5, 139 Cal.Rptr.3d 396; see also *Lee v. Placer Title Co.*, *supra*, 28 Cal.App.4th at p. 511, 33 Cal.Rptr.2d 572 [actual notice "does not substitute for compliance with [Code Civ. Proc., §] 1013"].)

Valero also cites authority that "mail sent to a former address is deemed properly served for up to one year after the change of address because postal regulations require the postal service to forward first class mail at no charge during that period" (*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 903, 77 Cal.Rptr.3d 679), and contends that because the clerk's notice in this case was sent within the one-year mail-forwarding window it should be deemed properly served absent proof it was not received. We do not agree. *Whitehead* is not on point, involved a different issue and opposite facts. It held that defendants who changed addresses but did *not* file a notice of change of address with the court were not denied due process when a notice of the trial date was mailed to their address of record, even though it was no longer their current address. (See *ibid.*) Unlike here, there was no issue in *Whitehead* about the validity of mail service under Code of Civil Procedure section 1013 much less the timeliness of a notice of appeal; quite sensibly, *Whitehead* simply held the defendants had no due process right to receive notice of the trial date at their new address when they never bothered to change their address of record on file with the court.

Nothing in either *Whitehead* or in postal mail forwarding regulations persuades us to interpret rule 8.104 in a manner that "would create a trap for the unwary." (*Citizens for Civic Accountability v. Town of Danville*, *supra*, 167 Cal.App.4th at p. 1164, 84 Cal.Rptr.3d 684.) The rule "must be strictly construed to preserve the right to appeal when possible without doing violence to the language of the rule." (*Id.* at pp. 1163-1164, 84 Cal.Rptr.3d 684.) Strict construction allows no room to depart from the requirement, incorporated by rule 8.104(a)(2) (service by any method "permitted by the Code of Civil Procedure"), that mail service be accomplished by addressing a notice of entry of judgment to "the office address as last given by that person on any document filed in the cause" (Code Civ. Proc., § 1013, subd. (a)). That was not done here.

The air district parties filed their notice of appeal within 60 days of the date that Valero's counsel served them with a (properly addressed) notice of entry of judgment. Accordingly, their appeal is timely. (See Cal. Rules of Court, rule 8.104(a)(1)(B).)

***637 II.**

The Hearing Board Applied the Correct Standard of Review.

The legal issue we are asked to decide in connection with the air district's banking decision is very narrow, and so we begin by clarifying what is not at issue. We are not asked to decide whether the air district should be *estopped* from using an emissions baseline period ending on the date of Valero's banking application, a theory Valero advanced before the hearing board but did not raise in the first cause of action of its petition for writ of mandate in the superior court and does not raise here. We also are not asked to decide whether the APCO and the hearing board *correctly interpreted* the air district's banking regulation to require the use of that emissions baseline period rather than the (more favorable) ****899** baseline period Valero used in its permit application. The merits of that issue were not before the superior court in Valero's first cause of action and are not before us now. [13] The sole legal question we are asked to decide is whether the hearing board applied the proper standard of review in deciding Valero's appeal. That is all.

We review this legal question de novo. In reviewing an agency's decision on a question of law " ' "the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal." ' " (*Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1174, 92 Cal.Rptr.2d 257.)

The air district parties argue that the hearing board correctly interpreted and applied its standard of review, and therefore the superior court erred in vacating the hearing board's decision and directing it to reconsider Valero's appeal. They, along with several amici who have submitted briefs in support of their position, [14] assert that Rule 3.6 requires the board to determine *only* whether the APCO's decision was correct as a matter of law and does not empower the board to depart from the law based on board members' individual views as to whether applying the regulation in the circumstances before it is substantively fair. The air district parties also assert, secondly, that the board engaged in exactly the inquiry required by Rule 3.6 and the superior court erred in concluding otherwise.

***638** Valero, on the other hand, contends Rule 3.6 "goes beyond requiring simply a check on the 'legal correctness' of APCO regulatory interpretations" and, instead, broadly empowers the hearing board to "go[ ] beyond the bare interpretation of the regulations at issue" and consider " 'basic principles of fundamental fairness' " in deciding an appeal. It says that "Rule 3.6 specifies a multi-faceted standard of review under which both facts and law—and not just mere interpretation of regulations—may be important in determining whether a banking application was 'properly refused' by the APCO." Indeed, although Valero's appellate briefing is somewhat opaque about the contours of what Rule 3.6 supposedly entails, and it backpedals in its response to amicus curiae briefing (inconsistently), [15] it was quite clear in its briefing before the hearing board. There, Valero expressly conflated the standard of review required by Rule 3.6 with the principles of equitable estoppel, telling the hearing board there was in fact no difference ("they are the same arguments—indeed, the same issues"). Here, since the board members expressed concerns about the substantive fairness of the outcome—and indeed, in advisory comments, ****900** even encouraged the APCO to "reconsider the fairness of denying banking credits under these circumstances"—Valero says that the board prejudicially misconstrued its standard of review and it urges us to affirm the superior court's ruling. Second, and relatedly, Valero also faults the hearing board for considering only whether the APCO's interpretation was "reasonable" and nothing more.

We agree with the air district parties.

A. The Hearing Board Is Not Empowered To Review the APCO's Decision for "Fundamental Fairness."

We start with the general principle that the hearing board was required to exercise its independent judgment in deciding Valero's appeal. It could not blindly ratify the APCO's decision but, rather, was required to decide the merits of the issues for itself. On appeal, this basic proposition does not appear to be in contention. The superior court concluded that the hearing board's standard of review encompassed the obligation to exercise independent judgment; Valero argues the trial court "properly recognized that Rule 3.6 effectively restates the independent standard of review"; and the air district parties embrace this understanding of the hearing board's standard of review as well. They argue the hearing board properly "applied its own ***639** independent judgment," and equate the board's standard of review with the principles of judicial review prescribed in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (*Yamaha*). Under *Yamaha*, our Supreme Court's seminal decision establishing the framework for assessing the amount of judicial deference an administrative interpretation is entitled to by the courts, " 'The standard for judicial review of agency interpretation of law is *the independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.' " (*Id.* at p. 8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Moreover, our independent research has revealed cases in which an independent review standard has been held applicable to administrative entities acting in a reviewing capacity that, like the hearing board, have the power to take evidence, hear from witnesses, entertain argument and render a decision. (See *Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1233-1235, 179 Cal.Rptr.3d 82 (*Quintanar*) [hearing officer presiding over appeal of employee disciplinary proceeding pursuant to county collective bargaining agreement required

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to exercise independent judgment regarding appropriate discipline]; *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1157, 34 Cal.Rptr.3d 209 [county civil service commission must "independently review the facts and law" in appeal from disciplinary order]; accord, *Lopez v. Imperial County Sheriff's Office* (2008) 165 Cal.App.4th 1, 5, 80 Cal.Rptr.3d 557 [county appeals board presiding over appeal of employee termination].) "In any review process, a provision that the reviewer must hold a full evidentiary hearing tends to show that the reviewer is supposed to exercise independent judgment; this is true regardless of whether the review process is contractual or statutory. Likewise, a provision, whether contractual or statutory, that a reviewer can 'modify' a decision tends to show that the reviewer is supposed to exercise independent judgment." [16] (*Quintanar*, at p. 1235, 179 Cal.Rptr.3d 82.) There is no reason to conclude the district's enactment of Rule 3.6 ****901** was intended to circumscribe the board's review powers more narrowly. And, as said, no party contends otherwise. [17]

***640** Contrary to the trial court's ruling, however, the hearing board's exercise of independent judgment under Rule 3.6 does not encompass a broader inquiry than simply determining whether the APCO's interpretation and application of the applicable regulations was correct as a matter of law. It does not allow (much less require) the hearing board to decline to apply the regulations if, in the hearing board's view, applying them in the case before it would be "unfair." [18] The trial court erred in holding otherwise.

First, no statute authorizes the district to promulgate a regulation empowering its hearing board to engage in such an expansive and amorphous "fairness" inquiry. (See *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305, 183 Cal.Rptr.3d 451 ["An administrative agency 'has only as much rulemaking power as is invested in it by statute' "]; *Friends of the Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 117, 181 Cal.Rptr.3d 250 [similar].) The Legislature has specified that *the APCO* is legally required to follow the law, i.e., to enforce "[a]ll orders, regulations, and rules prescribed by the district boards" (§ 40752), and in the banking context in particular, section 40713 requires the hearing board to determine only whether the APCO "properly refused" a banking application. [19] It follows that the hearing board is charged with deciding only whether the APCO "properly" enforced the district's orders, regulations and rules on the subject. Nothing more. (See *Industrial Indemnity Co. v. City and County of San Francisco* (1990) 218 Cal.App.3d 999, 1009, 267 Cal.Rptr. 445 ["A court must construe an administrative regulation in light of the enabling statute's intent"].) Valero asserts that "[i]t makes no sense to equate 'properly refused' with 'legally correct.' " But that rather astonishing position makes no sense. Indeed, elsewhere in its briefing Valero says the opposite, acknowledging that the statutory "properly refused" standard entails reviewing for legal *error*. [20]

****902** We also recognize, of course, the hearing board is authorized to "adopt rules for the conduct of its hearings" (§ 40807), but the fact " '[t]hat an agency has been granted *some* authority to act within a given area does not mean that it enjoys *plenary* authority to act in that area.' " (***641** *Friends of the Kings River v. County of Fresno*, *supra*, 232 Cal.App.4th at p. 117, 181 Cal.Rptr.3d 250.) That limited grant of *procedural* power (governing the "conduct" of hearings), cannot reasonably be construed as a grant of *substantive* authority to disregard duly enacted administrative regulations. Not even Valero seriously points to section 40807 as a source of legislative authority for the expansive interpretation of Rule 3.6 it advocates. [21]

Second, nothing in the plain language of Rule 3.6 itself suggests the hearing board is to engage in anything other than a traditional quasi-judicial administrative review exercise. The rule states that the hearing board's "role" is "to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO" and "to determine whether the agency's interpretation of its duty was reasonable," while also incorporating the presumption of correctness, commanding "deference" to the District's decision, and providing that the hearing board "may not readily substitute its judgment for that of the District's expertise."

Valero places great reliance on the rule's mention of "fair and reasonable," but that language does not support its expansive interpretation of Rule 3.6. The rule expressly says the relevant question is whether the APCO's "*interpretation* of the applicable *legal requirements* of the law is "fair and reasonable," not whether *applying* that law is fair in the particular case. This language

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does nothing more than reflect fundamental principles of constitutional, statutory and regulatory construction, using terminology regularly employed by both the United States Supreme Court and our Supreme Court. (See, e.g., *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, fn. 4, 108 S.Ct. 2687, 101 L.Ed.2d 702 [constitutional provision should not be given " 'a crabbed interpretation that robs [it] of its full, fair and reasonable meaning' "]; *People v. Freeman* (1988) 46 Cal.3d 419, 425, 250 Cal.Rptr. 598, 758 P.2d 1128 [statute will be construed in a manner that is constitutional where it is capable of such meaning " 'by fair and reasonable interpretation' "]; *Bank of America etc. Assn.* (1937) 9 Cal.2d 46, 52, 69 P.2d 839 [statutes must be "reasonably and fairly interpreted ... so as to give effect, if possible, to the expressed intent of the legislature"]; *State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 79, 91 Cal.Rptr.2d 381 [interpreting insurance regulations based on "a fair reading of the regulations as a whole"].) Likewise, Rule 3.6's directive to consider whether the APCO's interpretation of the law is "consistent with other actions ***642** of the APCO" simply reflects one factor under the *Yamaha* framework for assessing the amount of deference to give an agency's interpretation of law. The reviewing tribunal considers ****903** whether "the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing,' " because " '[a] vacillating position ... is entitled to no deference.' " (*Yamaha, supra*, 19 Cal.4th at p. 13, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

We also find support for the air district parties' construction of Rule 3.6 in the academic commentary. Both parties cite a law review article authored by Santa Clara University Law Professor Kenneth Manaster, who served as chairman of this very hearing board for more than 10 years (1978-1989) and represented Valero in this case. (Manaster, *Fairness In The Air: California's Air Pollution Hearing Boards* (2006) 24 UCLA J. Envtl. L. & Pol'y 1, 1, fn. *.) Professor Manaster describes the standard of review governing air district hearing boards in language that virtually mirrors the text of Rule 3.6, with no mention of a duty to consider whether applying the law in any given case would be "fair" but, on the contrary, making clear that a hearing board's duty is solely to ascertain whether district staff properly followed the law. According to Professor Manaster: "[T]he inquiry ... should be *whether the district staff has made a fair, reasonable interpretation of the applicable legal requirements* in its action .... The hearing board's usual function should be to determine *whether the staff view in the permit dispute* [22] *falls within a sensible application of the language and purpose of the pertinent regulations or other requirements*. [¶] This perspective is consistent with the traditional legal presumption of the regularity and correctness of administrative action. This presumption means that the burden of proof in a permit dispute should be on the party challenging the district staff's action or finding. It also means that the hearing board should not lightly disagree with the staff's determinations. *A hearing board in permit cases is operating analogously to the role of an appellate court reviewing administrative agency action*. This is in contrast to the board's function in variance or abatement cases, where the better analogy is the work of trial courts determining matters in the first instance. In short, the hearing board should not substitute its judgment in permit cases for that of the expert, full-time staff of the [Air Pollution Control District]. [¶] This does not mean, of course, that this oversight and review function of the hearing board should be forfeited through automatic, uninformed deference to the staff." (Manaster, 24 UCLA J. Envtl. L. & Pol'y at pp. 80–81, italics added, fns. omitted.) Professor Manaster's views are at odds with Valero's assertion that the hearing board is *not* "like any reviewing tribunal" subject to " 'familiar judicial principles' " that "apply to reviewing *courts* evaluating agency interpretations," and Valero's view that Rule 3.6 does *not* "limit[ ] the Board ***643** to a regulatory interpretation exercise to determine whether the APCO properly effectuated the intent of the Board of Directors in adopting the regulations."

Finally, both the air district parties and the amici curiae caution that upholding the expansive construction of Rule 3.6 that Valero urges would cause great regulatory uncertainty. As the state Air Resources Board puts it, "If hearing boards, exercising independent judgment, could reverse an APCO's action, even after determining that the APCO applied a reasonable legal construction in conformance with procedural requirements, they could functionally repeal or amend air districts' technical permit regulations on a case-by-case basis. That is not the role of hearing boards, ****904** which do not enact substantive regulations and are not charged to enforce them. [23] A broad expansion of the hearing board's scope of review, sought by Valero and sanctioned by the Superior Court, would destabilize public health controls by frustrating the public rulemaking process and engendering regulatory uncertainty." Such an approach would threaten to decrease transparency in decisionmaking, it tells us,

decrease the ability of third parties to rely on APCO decisions, and ultimately impede the stateAir Resources Board itself from fulfilling its statutory mandate to coordinate statewide pollution control activities.

Administrative review depends no less on proper adherence to the law than does judicial review. *Courts* cannot refuse to follow the law " 'simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem.' " (*San Diego County Water Authority v. Metropolitan Water Dist.* (2004) 117 Cal.App.4th 13, 28, 11 Cal.Rptr.3d 446.) As this court has recognized, proper interpretation of the law might produce results that are "uneven, perhaps even unfair," but that does not empower courts to declare the result unlawful. (*Service Employees Internat. Union, Local 1000 v. Brown* (2011) 197 Cal.App.4th 252, 275, 128 Cal.Rptr.3d 711.) "The wisdom and expediency of the choices made by the political branches are not subject to judicial recalibration." (*Ibid.*) The same is true of the hearing board carrying out its statutory mandate to review whether the APCO's decision was "properly refused" under regulations duly promulgated by the air district.

That said, the hearing board did consider Valero's "fairness" evidence, and addressed it in a context that was appropriate, namely, in evaluating Valero's equitable estoppel claim. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 402-404, 261 Cal.Rptr. 310, 777 P.2d 83 [largely factual claims of estoppel should be heard first in administrative hearing despite absence of ***644** specific statutory authorization for such defense].) As the parties recognized in their prehearing briefs, equitable estoppel is an established doctrine with well-defined elements, including intentional or negligent inducement of reliance and actual reliance. The APCO disputed both of these elements, and as we have already discussed, the hearing board rejected Valero's estoppel argument on several grounds, in effect finding no acts or statements by the APCO that were intended to or negligently caused Valero's reliance. In the first cause of action in its writ petition, Valero did not challenge the hearing board's factual determinations, and the issue of whether those findings have the requisite support therefore is not before us. In any event, we reject the trial court's suggestion that the hearing board chose not to consider Valero's evidence at all and its conclusion that the hearing board should have determined whether that evidence violated some nebulous concept of fairness untethered from equitable estoppel.

B. The Hearing Board Properly Applied Rule 3.6.

Although the principal focus of the parties' briefing, as well as the amicus curiae briefing, is on the foregoing fairness issue, the superior court also misconstrued the hearing board's decision as more deferential than it in fact was, and on appeal Valero does too. As the air district parties argue, the hearing board did not solely ****905** consider whether the APCO's interpretation of the banking regulation was reasonable. Rather, it acknowledged and applied the very standard that Rule 3.6 required: namely, "whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO." There is simply no other way to read the board's decision. [24]

First, the hearing board quoted Rule 3.6 and said that it had "applied this standard in reaching its decision in this matter." Next, it found that "[t]he APCO's interpretation of Regulation 2-2-605.1, and its application of that provision in this particular case, was fair and reasonable and consistent with other actions of the APCO. The APCO's interpretation of Regulation 2-2-605.1 was reasonable, and the APCO applied this interpretation fairly and consistently to Valero in the same manner as it has applied it to other similarly-situated applicants seeking to bank emission reduction credits under ***645** similar circumstances." It then spent three pages explaining its reasons, which were based upon: (1) the language of the regulation, (2) its regulatory context, (3) evidence of the district's regulatory intent contained in a staff report issued when the regulation was adopted, (4) a prior version of the regulation, and (5) the board's factual finding that the district had applied the regulation the same way to two similarly situated applicants in the past. The board then concluded: "The Hearing Board therefore finds that the APCO's interpretation of Regulation 2-2-605.1, and its application of Regulation 2-2-605.1 to Valero's banking application in this case, *was fair, reasonable, and consistent with other actions of the APCO*, for all of the reasons outlined above." (Italics added.)

C. Conclusion

Because the hearing board applied the correct standard of review, the superior court erred in granting a writ of mandate on Valero's first cause of action. The air district parties also ask us to exercise our discretion to dismiss the other two claims

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Valero asserted in its writ petition that the superior court did not reach. But the air district parties have briefed these issues in a conclusory manner that does not facilitate meaningful appellate review, the superior court did not address these other claims which were clearly mooted by its ruling on the first cause of action, and we believe it should decide those causes of action in the first instance.

DISPOSITION

The judgment is reversed. Appellants shall recover their costs.

Kline, P. J., and Richman, J., concurred.

All Citations

49 Cal.App.5th 618, 262 Cal.Rptr.3d 885, 20 Cal. Daily Op. Serv. 4971, 2020 Daily Journal D.A.R. 5152

Footnotes

1 Unless otherwise noted, all further statutory references are to the Health and Safety Code.

2 No officer or employee of the district may sit on the hearing board. (§ 40803.)

3 Specifically, section 40709 provides that every air district board "shall establish by regulation a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall be banked prior to use to offset future increases in emissions." (§ 40709, subd. (a).) The intent of the system is to "provide a mechanism for districts to recognize the existence of reductions of air contaminants that can be used as offsets, and to provide greater certainty that the offsets shall be available for emitting industries." (*Id.*, subd. (b).) Substantively, it specifies that "[t]he system shall provide that only those reductions in the emission of air contaminants that are not otherwise required by any federal, state, or district law, rule, order, permit, or regulation" are eligible for being banked and used to offset future increases in air pollution emissions. (*Id.*, subd. (a).)

4 In full, regulation 2-2-605.1 states: "The baseline period consists of the 3 year period immediately preceding the date that the application is complete (or shorter period if the source is less than 3 years old). The applicant must have sufficient verifiable records of the source's operation to substantiate the emission rate and throughput during the entire baseline period."

5 Technically, the furnace upgrades were addressed in a separate written amendment to the April 2008 permit application filed several months later, in December 2008. No party ascribes any significance to that fact, however, and in their briefing both parties treat the permit application as having been filed in April 2008. We will do the same.

6 Valero obtained an amended federal operating permit in December 2010.

7 Although Valero submitted its permit application in April 2008, and the application was deemed complete in May, March was the last month for which it had a complete set of emissions data to calculate its projected emissions reductions for the application.

8 Valero's permit application had originally proposed an even earlier baseline period.

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9 For example, the evaluation stated that "Valero may bank any allowable excess of emissions reductions, in accordance with Regulation 2, Rule 4, after the project is built and the actual equipment has shut down." A district employee testified this statement meant only that a banking *certificate* could not issue until after the equipment had been shut down but did not mean Valero could not have submitted a banking *application* with its [New Source Review] permit application. The engineering evaluation also said that reductions "shall be eligible for banking after being demonstrated by source-testing or other means acceptable to the APCO."

10 Contrary to the suggestion by the air district parties, the appealable judgment was the court's order granting a writ of mandate, not a "judgment" that it subsequently entered. (See *Molloy v. Vu* (2019) 42 Cal.App.5th 746, 753, fn. 6, 255 Cal.Rptr.3d 679.)

11 Before they did so, Valero filed a request asking us to take judicial notice of email correspondence between counsel corroborating the fact that appellants' counsel possessed a file-stamped copy of the judgment. We now deny that request, both because such materials are not a proper subject of judicial notice and they are irrelevant in light of the air district parties' acknowledgement they did receive the clerk's notice. We also deny the air district parties' request to take judicial notice of the materials that their counsel did, in fact, receive because the fact of receipt is established by their counsel's declaration.

12 Notice mailed to an address that is not an attorney's address of record is not a trivial, technical misstep. We are dealing here not with a misspelling, a wrong name or a missing ZIP Code but, rather, a totally incorrect address as reflected in the trial court's records.

13 We express no opinion whether these merits issues are encompassed by either of the two remaining causes of action that were mooted by the superior court's ruling. The parties are free to address the scope of those two other claims on remand.

14 There are two amicus curiae briefs, one submitted by the state Air Resources Board and the other by four regional air quality and air pollution control districts (South Coast, Sacramento, San Joaquin and Monterey Bay).

15 In that filing, Valero asserts repeatedly that "fairness" pertains only to the proper *interpretation* of the applicable regulations, arguing for example that "the Hearing Board was entitled under Rule 3.6 to address the competing interpretations and to adopt the one that avoided (rather than caused) manifest injustice." On the other hand, it also asserts repeatedly in that filing that "Rule 3.6 plainly goes beyond requiring simply a check on the 'legal correctness' of APCO regulatory interpretations," and gives the hearing board "wide latitude to fashion an appropriate remedy."

16 The hearing board's rules specify it may do this.

17 Although the cases we located in our independent research held that little or no deference was owed in the circumstances presented there (see *Quintanar, supra*, 230 Cal.App.4th at p. 1235, 179 Cal.Rptr.3d 82 ["Based on the wording chosen by the parties to the [memorandum of understanding], we conclude that the Department gave up any requirement that the hearing officer defer to its discretion"]; *Kolender v. San Diego County Civil Service Com., supra*, 132 Cal.App.4th at p. 1157, 34 Cal.Rptr.3d 209 [sheriff's decision was "not due substantial deference"]), none involved an agency's interpretation of its own regulation, nor a rule specifying a particular standard of review such as Rule 3.6 expressly requiring "deference to the agency's determination." Here, although Valero appears to blow hot and cold on the subject, ultimately we understand all parties to agree that Rule 3.6 incorporates the principles of judicial review expressed in *Yamaha* and its progeny. The parties have not specified how those factors would apply here, however, and we are not asked to decide that issue.

18 The parties disagree as to how much deference *we* must give the *hearing board's* interpretation of its own standard of review embodied in Rule 3.6, but it is unnecessary to decide that issue because we readily agree with the board's interpretation even if we give it no deference.

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19 The Legislature has utilized similar language to describe the scope of other types of appeals before the hearing board. (See §§ 42302 [whether permit "was properly denied"], 42302.1 [whether permit "was properly issued"], 42306 [whether permit "was properly suspended"].)

20 Valero points out in its respondent's brief that Rule 3.6 expressly requires the hearing board to "determine whether 'the District's action was erroneous' " which Valero says "echoe[s] the statutory requirement" under section 40713 "that the Board determine 'whether the application was properly refused.' "

21 Apart from a generalized string citation, Valero cites section 40807 in one sentence of its response to amicus curiae briefing where it asserts, without discussion or analysis: "The Code allows all air district hearing boards discretion to carry out their statutory review authorities by adopting their own rules for hearing administrative appeals of banking decisions and other determinations by air district staff. *See* [Health & Saf. Code,] § 40807."

22 The author characterizes ERC banking applications as a type of "permit dispute." (See Manaster, 24 UCLA J. Envtl. L. & Pol'y, at p. 79.)

23 As we have discussed, it is the air district's *governing* board, acting in a quasi-legislative capacity, that adopts substantive rules and regulations. (See p. 625, *ante*.)

24 Although both parties quote liberally from comments by individual board members at the hearing, we review only the hearing board's written ruling. Oral comments or statements made during deliberations cannot be used to impeach the board's final decision. (See, e.g., *Key v. Tyler* (2019) 34 Cal.App.5th 505, 539, fn.16, 246 Cal.Rptr.3d 224 [court's comments from the bench "were not final findings and cannot impeach the court's subsequent written ruling"]; *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300-301, 128 Cal.Rptr.3d 772 ["we disregard the trial court's tentative ruling and the comments the court made [at the hearing], and consider only the trial court's final order on the motion"].)

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West's Ann.Cal.Health & Safety Code § 42302.1

§ 42302.1. Public hearing; time limitations; decision; exception

Currentness

Within 30 days of any decision or action pertaining to the issuance of a permit by a district, or within 30 days after mailing of the notice of issuance of the permit to any person who has requested notice, or within 30 days of the publication and mailing of notice provided for in Section 1 of Chapter 1131 of the Statutes of 1993, any aggrieved person who, in person or through a representative, appeared, submitted written testimony, or otherwise participated in the action before the district may request the hearing board of the district to hold a public hearing to determine whether the permit was properly issued. Except as provided in Section 1 of Chapter 1131 of the Statutes of 1993, within 30 days of the request, the hearing board shall hold a public hearing and shall render a decision on whether the permit was properly issued.

Credits

(Added by Stats.1988, c. 1568, § 28.5. Amended by Stats.1993, c. 1131 (S.B.919), § 3; Stats.1999, c. 643 (A.B.1679), § 12.)

West's Ann. Cal. Health & Safety Code § 42302.1, CA HLTH & S § 42302.1
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

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West's Ann.Cal.Health & Safety Code § 42451

§ 42451. Hearing board; authority; notice and hearing; stipulations

Currentness

(a) On its own motion, or upon the motion of the district board or the air pollution control officer, the hearing board may, after notice and a hearing, issue an order for abatement whenever it finds that any person is constructing or operating any article, machine, equipment, or other contrivance without a permit required by this part, or is in violation of Section 41700 or 41701 or of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air.

(b) As an alternative to subdivision (a), the hearing board may issue an order for abatement pursuant to the stipulation of the air pollution control officer and the person or persons accused of constructing or operating any article, machine, equipment, or other contrivance without a permit required by this part, or of violating Section 41700 or 41701, or any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air, upon the terms and conditions set forth in the stipulation, without making the finding required under subdivision (a). The hearing board shall, however, include a written explanation of its action in the order for abatement.

Credits

(Added by Stats.1975, c. 957, p. 2188, § 12. Amended by Stats.1986, c. 147, § 1; Stats.1988, c. 183, § 2.)

West's Ann. Cal. Health & Safety Code § 42451, CA HLTH & S § 42451
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

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BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In The Matter Of

BAKER COMMODITIES INC.,

[Facility ID No. 800016]

Petitioner,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,

Respondent.

Case No. 6223-2

[PROPOSED] ORDER GRANTING SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO THE ORDER FOR ABATEMENT

Date: February 26, 2025
Time: 9:30am
Place: Hearing Board
South Coast Air Quality
Management District
21865 Copley Drive
Diamond Bar, CA 91765

This matter came on before the South Coast Air Quality Management District Hearing Board ("Hearing Board") for hearing on February 26, 2025. George Gigounas and Caroline Lee of DLA Piper LLP appeared for Appellant/Petitioner Baker Commodities Inc. ("Baker"). Daphne P. Hsu and Nicholas P. Dwyer appeared for Appellee/Respondent South Coast Air Quality Management District ("South Coast AQMD" or "District").

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that any and all evidence, references to evidence, testimony or argument relating to the following be excluded from presentation before the Hearing Board:

1. Evidence and argument related to the Order for Abatement, including any stipulations, references to testimony and hearing board member deliberation prior to Baker's decision to submit the details of the permit applications that are before this hearing board, except to specify the conditions from the Second Modified Order for Abatement, Case No. 6223-1.
2. Purported evidence and argument related to the alleged importance of Baker's animal rendering operations, which Baker ceased performing and are not included in the permit applications.

IT IS HEREBY FURTHER ORDERED that counsel and any witnesses shall:

1. Not mention, refer to, or attempt to convey in any manner, either directly or indirectly, any of the purported evidence mentioned in this Motion, without first obtaining permission of the Hearing Board; and
2. Counsel shall warn and caution witnesses to strictly follow the same instruction.

IT IS SO ORDERED.

Dated: _______________ ____________________________________

BOARD MEMBER