BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
PAPICH CONSTRUCTION COMPANY, INC. **800 Farroll Road** **Grover Beach, CA 93433** **Employer**	**1204848** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code renders the following Decision After Reconsideration.

JURISDICTION

On May 22, 2017, the Division of Occupational Safety and Health (Division) issued three citations to Papich Construction Company, Inc. (Employer), alleging five violations of California Code of Regulations, title 8. Citation 1, Item 1, alleges a Regulatory violation of section 342, subdivision (a)[1] [failure to report serious injuries]. Citation 1, Item 2, alleges a General violation of section 5144, subdivision (c)(2)(A) [failure to comply with the Respiratory Protection program requirements].[2] Citation 1, Item 3, alleges a General violation of section 5194, subdivision (f)(6) [failure to label containers of hazardous chemicals].[3] Citation 2, Item 1, alleges a Serious Accident-Related violation of section 3203, subdivision (a) [failure to comply with the Injury and Illness Prevention Program requirements]. Citation 3, Item 1, alleges a Serious Accident-Related violation of section 5141, subdivision (a) [failure to prevent harmful exposures by engineering controls].

Employer timely appealed the citations. The Board's Administrative Law Judge (ALJ) heard this matter over the course of a three-day hearing. The ALJ vacated Citation 1, Item 1 and Citation 3, Item 1. The ALJ upheld Citation 2, Item 1, but reclassified it to a General violation. The Division petitioned the Board for reconsideration, contesting only part of the ALJ's rationale for reclassifying Citation 2, Item 1, to a General violation. Employer filed an answer. The Board took the Division's Petition for Reconsideration under submission.

ISSUE

Did the ALJ properly reclassify Citation 2, Item 1, to a General violation?

[1] Unless provided otherwise, all citations are to the California Code of Regulations, title 8.
[2] Employer withdrew this item from its appeal. Therefore, the ALJ affirmed the violation.
[3] Employer also withdrew its appeal of Citation 1, Item 3. Therefore, the ALJ affirmed the violation.

FINDINGS OF FACT

1. On May 5, 2017, the Division mailed a Notice of Intent to Classify Citation as Serious (1BY) to Employer.

2. On May 8, 2017, Employer received the 1BY.

3. On May 22, 2017, 17 days after the Division mailed the 1BY and 14 days after Employer received it, the Division issued the citations.

DISCUSSION

In its decision, the ALJ reclassified Citation 2, Item 1, to a General violation on two separate bases. First, the ALJ held the Division did not meet its burden in establishing a rebuttable presumption Employer committed a Serious violation of the safety order. Second, the ALJ held the Division failed to comply with the time requirement in Labor Code section 6432, subdivision (b)(2). In its Petition for Reconsideration, the Division solely took issue with the ALJ's second basis for reclassifying Citation 2, Item 1. Therefore, the Board will only address that issue since "the petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which reconsideration is sought other than those set forth in the petition for reconsideration." (Lab. Code, § 6618.)

The ALJ's reclassification of the citation stands regardless of the Board's decision on whether the Division failed to comply with the Labor Code's 15-day time requirement, making the instant matter moot. However, calculating the Labor Code's 15-day time requirement before the Division issues a Serious citation is a matter of important public interest that has and is likely to recur. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121; *In re Robert A.* (1992) 4 Cal.App.4th 174, 182.) Therefore, the Board will address this issue.

Labor Code section 6432, subdivision (b)(2), states, in part,

> The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision.

The ALJ applied California Code of Civil Procedure (CCP) section 1013, subdivision (a), to the 15-day time requirement in Labor Code section 6432, subdivision (b)(2). The ALJ held the Division should have waited until May 25, 2017 (20 days after the Division mailed the 1BY) to issue a Serious violation by concluding in cases where the Division mails employers the 1BY forms, CCP section 1013, subdivision (a), extends the Labor Code's 15-day time requirement.

Alternatively, the ALJ held even if the Labor Code's 15-day time requirement commences after the Employer received the citation (May 8, 2017), the Division issued the citations in violation of the Labor Code (15 days after May 8 was May 23, 2017). Thus, the Division's act of issuing the citations on May 22, 2017, was before the Labor Code's 15-day time requirement ended.

As mentioned, the Division only challenges the ALJ's holding that in cases where the Division mails the 1BY, CCP section 1013 adds more time to the Labor Code's 15-day time requirement. For the reasons explained below, the Board agrees with the Division that CCP section 1013 does not apply to Labor Code section 6432, subdivision (b). Nevertheless, a straightforward analysis of the language in Labor Code section 6432, subdivision (b), focusing on the term "deliver," compels the Board to uphold the ALJ's reclassification of the citation to General based on the ALJ's alternative rationale—counting the Labor Code's 15-day time requirement from the date Employer received the 1BY.

California case law establishes CCP section 1013 does not apply to statutes where a prescribed time period commences by some circumstance, act, or occurrence other than service. In other words, if the statute does not use the term "service" or "serve," CCP section 1013 does not apply to extend the time. (*Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 684-685 [holding CCP section 1013 does not apply to statutes where a prescribed time period commences by an act other than service]; *Raam Construction, Inc. v. Occupational Safety & Health Appeals Bd*. (2018) 28 Cal.App.5th 709, 714; *San Mateo Federation of Teachers v. Public Employment Relations Bd.* (1994) 28 Cal.App.4th 150, 155; *Citicorp North America, Inc. v. Superior Court* (1989) 213 Cal.App.3d 563, 567 [the Legislature intended CCP section 1013 to apply to "service" statutes where statutory deadlines trigger by a notice, document, or request which is served by mail]; *Amoroso v. Superior Court* (1979) 89 Cal.App.3d 240, 242 [CCP section 1013 does not apply partly because the statute states "filed," not served].)

The operative trigger of the time period in Labor Code section 6432, subdivision (b)(2), commences when "the Division delivers to the employer" a 1BY form. Thus, the statute at issue is not a "service statute," demonstrating the inapplicability of CCP section 1013 to Labor Code section 6432, subdivision (b)(2).

Labor Code section 6432, subdivision (b)(2), states the Division shall determine and consider the facts in subdivision (b)(1), if not less than 15 days prior to issuing a Serious citation, the Division "delivers" the 1BY to an employer. To interpret the term "deliver," the Board looks to the plain meaning of the term. It is a well-established rule of statutory construction that '"the words of the statute should be given their ordinary and usual meaning and should be construed in their regulatory context.'" (*People v. Toney* (2004) 32 Cal.4th 228, 232.) If the statute's language is clear, we presume the Legislature meant what it said and the plain meaning of the statute governs. (*Ibid.*) In construing a particular clause of a statute, courts read that clause in harmony with other clauses and in context of the statutory framework as a whole. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.)

Merriam-Webster defines delivery as "the act of taking something to a person or place: something that is taken to a person or place: something that is delivered." (Merriam Webster, definition of delivery <https://www.merriam-webster.com/dictionary/delivery#synonyms> [as of Sept. 28, 2019].) Numerous dictionaries have defined "deliver" as "**1**. The delivering of letters, goods, etc. **2**. A giving up or handing over; surrender"[4]; "1. Handing over. 2. A distributing as of mail. 6. something delivered"[5]; "1. The carrying and turning over of letters, goods, etc., to a designated recipient or recipients"[6]; "the act of taking goods, letters, or packages to people's houses or places of work."[7].) These definitions suggest the Division "delivers" the 1BY to an employer when it actually surrenders or hands over the 1BY to an employer; i.e. the employer receives the 1BY.

This interpretation is also supported by the Legislature's use of term "deliver" in other Labor Code provisions. For instance, Labor Code section 6317 states, in part, "The period specified for abatement shall not commence running until the date the citation or notice is received by certified mail and the certified mail receipt is signed, or if not signed, the date the return is made to the post office. If the division officially and directly delivers the citation or notice to the employer, the period specified for abatement shall commence running on the date of the delivery." (Emphasis added.) This Labor Code provision demonstrates by use of the term "delivers," the Legislature means actual receipt of an item. If the Legislature used "delivers" in this sense in section 6317, by using the same term in section 6432, it must have intended the same meaning. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1125 ["it is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute"].)

Not only is the Board's interpretation consistent with the plain meaning of the term "deliver" and other provisions of the Labor Code but the Board's position is also supported by the California case law. (*Benson v. Superior Court of Napa County* (1963) 214 Cal.App.2d 551, 562 ["Any method of transmission to him which is calculated to put the list in his possession ought to suffice" in satisfying the meaning of the term "delivers" in the statute]; see *Labarthe v. McRae* (1939) 35 Cal.App.2d 734, 737 [holding the term "receive" clearly implies delivery and something that has been taken into possession].) Thus, for the Division to timely "deliver" the 1BY to employers under the Labor Code's 15-day requirement, the time commences running 15 days from employer's receipt of the 1BY.

In cases where the Division fails to comply with the 15-day time requirement before it issues the citations, the Labor Code provides the remedy. Labor Code section 6432, subdivision (d) states, in part, "The trier of fact may also draw a negative inference from factual information offered at the hearing by the division that is inconsistent with factual information provided to the employer pursuant to subdivision (b), or from a failure by the division to provide the form setting forth the descriptions of the alleged violation and soliciting information pursuant to

[4] The Random House College dict. (Revised ed.) p. 352, col. 1 [Emphasis in original].
[5] Webster's New World dict. (2d ed. 2002) p. 164, col. 2 [Emphasis in original].
[6] dictionary.com, delivery (2019) <https://www.dictionary.com/browse/delivery> [as of Sept. 28, 2019].)
[7] Cambridge Dictionary, Definition of "delivery" English Dictionary (Cambridge University Press 2018) <https://dictionary.cambridge.org/us/dictionary/english/delivery> [as of Dec. 26, 2018].

subdivision (b).” Thus, the ALJs have the discretion to draw a negative inference should the Division fail to comply with section 6432, subdivision (b)’s requirements. (*West Coast Arborist, Inc.,* Cal/OSHA App. 1180192, Denial of Petition for Reconsideration (April 26, 2019); *Echo Alpha, Inc., John Stagliano, Inc., Evil Angel Productions, and John Stagliano, Inc. dba Evil Angel Video*, Cal/OSHA App. 14-0802, Decision After Reconsideration (Dec. 24, 2015).)

In the instant case, irrespective of the ALJ’s erroneous application of CCP section 1013 to Labor Code section 6432, the ALJ also alternatively analyzed the Labor Code’s 15-day time requirement from the date Employer received the 1BY—a rationale the Division does not challenge in its petition. The ALJ had discretion to draw a negative inference based on this latter rationale. Since the Division’s petition is limited to only whether CCP section 1013 may apply to Labor Code section 6432, not how the negative inference should apply should a negative inference be authorized, the Board need not reconsider this issue. Lack of argument in the Division’s petition waived arguments on this point. (Lab. Code, § 6618.) The Board will not disturb the ALJ’s decision to draw a negative inference since the Division failed to raise the contention in its petition to the Board and failed to “set forth specifically and in full detail the grounds upon which the petitioner considers the final order or decision made and filed by the appeals board or a hearing officer to be unjust or unlawful, and every issue to be considered by the appeals board.” (Lab. Code, §§ 6616, 6618.) The Division’s challenge is solely on the ALJ’s act of applying five extra days to the Labor Code’s 15-day time requirement pursuant to CCP, section 1013. The plain meaning of the term “deliver,” the Legislature’s use of the term in another Labor Code provision (section 6317), and California’s case law all support the Board’s conclusion that “deliver” means employer’s receipt of the 1BY notice. Any implications to the contrary in any prior Board cases (on this issue) are disapproved.

Ultimately, as discussed herein, the ALJ’s decision to reclassify the citation stands for two separate reasons. First, the ALJ found the Division did not meet its burden to establish a Serious classification of the Citation 2, Item 1—a conclusion on the merits that the Division failed to challenge. The ALJ’s decision to reclassify the citation on the merits stands regardless of whether the Division complied with the procedural requirements of Labor Code section 6432, subdivision (b)(2). By failing to dispute the ALJ’s conclusion on the merits, the Division waived any and all objections it may have had on that point and the ALJ’s reclassification to a General violation stands regardless of the Board’s analysis on the Labor Code’s procedural requirements. (Lab. Code, § 6618.) Second, in addressing the Division’s procedural contentions, the Board still holds the Division failed to comply with the Labor Code’s 15-day time requirement, leading to the ALJ’s discretion to draw a negative inference, an exercise of discretion the Board will not reconsider for the stated reasons.

DECISION

For the reasons discussed above, the Board affirms the ALJ’s reclassification of Citation 2, Item 1, to a General violation.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member

FILED ON: 10/18/2019