

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

CROP PRODUCTION SERVICES  
P.O. Box 698  
Imperial, CA 92251

Employer

Dockets. 09-R6D4-4036 through 4038

**DECISION AFTER RECONSIDERATION**  
**AND**  
**ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration of the Decision in the above-entitled matter on its own motion, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on July 13, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Imperial, California maintained by Crop Production Services (Employer). On November 3, 2009, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup> On October 26, 2010, an Administrative Law Judge (ALJ) of the Board issued a Decision in the matter, affirming Citation 1, Item 1 and the proposed penalty, affirming Citation 1, Item 2, but amending the proposed penalty, and dismissing Citations 2 and 3.

The Board ordered reconsideration of the ALJ's decision on its own motion on November 19, 2010. It affirmed the ALJ's decision as to Citation 1, Items 1 and 2, as well as Citation 2, and ordered remand for a proposed amendment of Citation 3. The ALJ issued a notice of proposed amendment to the parties on October 28, 2014, pursuant to Section 386 of the Board's rules of practice and procedure, and Government Code 11516. The notice provided the parties with an opportunity to file a written response to the ALJ describing

---

<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8. Citation 1 alleged a Regulatory violation of section 461(c) [air tank permit not posted], and a General violation of 3203(a)(7) [no training on care of coveralls]. Citation 2 alleged a Serious violation of 3329(b) [piping not designed in accordance with good engineering practice]. Citation 3 alleged a Serious violation of 3380(e) [protective coveralls not suitable].

prejudice to the party that would result unless the case is continued for allowance of additional evidence. Neither party filed a response. The ALJ next filed an order after remand on December 16, 2015, finding that she did not have authority to amend the safety order. The Board on January 15, 2015 ordered reconsideration of the ALJ's order after remand on its own motion. Both parties filed timely responses to the Board's order of reconsideration.

### **ISSUE**

Was the ALJ correct in refusing to amend citation 3 from 3880 subdivision (e) to 3880 subdivision (d)?

### **DECISION AFTER RECONSIDERATION**

As discussed at greater length in the Board's Decision After Reconsideration issued on May 28, 2014, Citation 3 alleges a violation of Section 3380 subdivision (e):

Protectors shall be of such design, fit and durability as to provide adequate protection against the hazards for which they are designed. They shall be reasonably comfortable and shall not unduly encumber the employee's movements necessary to perform his work.

The Division's citation also contains the following alleged violative description:

On July 10, 2009, an employee suffered a serious chemical burn injury to his upper leg when he was sprayed with 98% sulfuric acid during an unloading operation. He was wearing vapor permeable splash resistant protective coveralls. These coveralls were not intended for continuous contact or deluge with sulfuric acid. They were stored inside a vehicle or metal building in hot weather, were two years old, used many times and were not in their original condition. The coveralls on that day were not of such design or durability as to provide adequate protection against a direct spray of 98% sulfuric acid.

A related safety order applicable to PPE equipment, Section 3380 subdivision (d), reads as follows:

The employer shall assure that all personal protective equipment, whether employer-provided or employee-provided, complies with the applicable Title 8 standards for the equipment. The employer shall assure this equipment is maintained in a safe, sanitary condition.

A review of the record indicates that the parties introduced testimony and evidence most closely applicable to section 3380 subdivision (d), or Employer's procedures for maintaining its protective suits, rather than the design, fit, and durability of the suits. At hearing, the parties presented differing testimony and evidence as to whether Employer's handling, cleaning, and storage methods for the suits were appropriate given the manufacturer's care directions and other factors. Notably, neither party objected to introduction of testimony and evidence related to storage, cleaning, and care of the PPE. (*Spring Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d. 627, 636.)

The Board is cognizant "that California courts take a liberal view toward inartfully drawn complaints and other pleadings [citation] and routinely resolve variances between pleading and proof by allowing amendment before, during and after trial (see, e.g., *General Credit Corp. v. Pichel* (1975) 44 Cal.App.3d 844 [118 Cal.Rptr. 913]; 3 Witkin, Cal. Procedure (2d ed. 1971) § 300 et seq., pp. 1972-1973, and § 1056, p. 2631)." (*Spring Hill Aviation Co. v. Stroppe, supra.*) A variance between the pleadings and proof is not deemed material unless said variance has misled a party to their prejudice in maintaining their action or defense upon the merits. (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal. 3d 205, 212-213.) "Where the variance is not misleading, the court may find the facts according to the evidence or may order an immediate amendment. [Citations.]" (*State Medical Education Bd. v. Roberson* (1970) 6 Cal. App. 3d 493, 502 citing, *Genger v. Albers* (1949) 90 Cal.App.2d 52.) Nor is the Board required to "impose rules of pleading and proof more stringent than those followed in civil actions." (*Stearns v. Fair Employment Practice Com. supra* at p. 214.) Here, the parties can be said to have tried the issue of maintenance of the PPE by consent.

The Board also notes that, as raised by the Division in its answer, post-submission amendments to conform to proof are recognized as within the discretion of the hearing officer by the Federal Commission, operating under a similar statutory scheme. (See, *Morrison-Knudsen Co., Inc./Yonkers Contracting Co., Inc., a JV* (1993) 16 OSHC (BNA) 1105 [ALJ sua sponte post-hearing amendment: "Where issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."]; *Southwestern Bell Telephone Co.* (1978) 6 OSHC (BNA) 2130 [ALJ sua sponte amendment of citation upheld]; *Kaiser Aluminum and Chemical Corporation* (1976) 4 OSHC 1162 ["[E]ven in absence of a motion to amend we have a duty to determine issues which are presented by the evidence properly before us.].) While not dispositive, the Board has turned to interpretations of the Federal Act by the Commission and reviewing courts for nonbinding, persuasive authority. (*Department of Corrections California Medical Facility*, Cal/OSHA App. 97-1861, Decision After Reconsideration (Oct. 29, 1999).)

Employer argues that the Board is without authority to order a post-submission amendment, and urges adoption of the ALJ's reasoning in the order after remand. The Board declines to take such a position. Although not bound by the California Code of Civil Procedure, the Board is required to adopt rules of practice and procedure under Labor Code section 6603 that are consistent with the Government Code, including sections 11507 and 11516. Section 11516 explicitly contemplates post-submission amendment by the Board of an accusation. Where such an amendment is proposed, the Government Code and Board's rules of practice and procedure require the parties be given notice of the proposed amendment and the opportunity to show that they will be prejudiced thereby. Prejudice may be cured by reopening the record to permit the introduction of additional evidence. (*Hood Corporation*, Cal/OSHA App. 85-672, Decision After Reconsideration (Dec. 2, 1987); Gov. Code 11516, Cal. Code of Regs. Title 8, section 386.)

The Board's governing statutes and regulations favor allowance of amendment, as does relevant California case law, in instances where the parties have tried an issue by consent. (See, *Rose v. State Bar* (1989) 49 Cal.3d 646, 654 ["Disciplinary charges against an attorney may be amended to conform to proof, provided the attorney is given a reasonable opportunity to defend against the charge[.]"]) Resolving an issue on the merits, rather than disposing of a case due to technical defect is the favored means of resolving matters in California courts, and the Board will follow that sound policy here. (See, *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.) In the alternative, Employer has requested the opportunity to introduce additional evidence in defense of a violation of Section 3380 subdivision (d), should the amendment be allowed. This request is granted.

We remand the matter to Hearing Operations for further proceedings consistent with this Decision After Reconsideration.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MAR 28, 2016