

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

In the Matter of the Appeal of:

POUK & STEINLE, INC.
P.O. BOX 3039
Riverside, CA 92519

Employer

Docket Nos. 03-R4D2-1495
and 1496

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken Pouk & Steinle, Inc.'s (Employer) Petition for Reconsideration under submission, and after reviewing the entire record, renders the following decision after reconsideration.

JURISDICTION

On October 16 and 17, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer, at Brightwood and Hillside Streets, in Monterey Park, California.

On March 26, 2003, the Division issued three citations to Employer, each containing one alleged violation. Citation 1 alleged three bases for finding the Employer had an invalid Injury and Illness Prevention Plan (IIPP). Citation 2 alleged a serious violation of 8 C.C.R. § 2940.2 for failure to maintain a safe clearance from energized electrical parts. Citation 3 alleged a serious violation of 8 C.C.R. § 2940, which requires an observer be provided to prevent accidents and render assistance in the event of an accident occurring while work is being done on exposed parts connected to a high-voltage system. Employer filed timely appeals contesting all three citations, and raising numerous affirmative defenses.

This matter came on regularly for hearing on April 19 and April 20, 2005, before an Administrative Law Judge (ALJ) for the Board and the matter was submitted on the final hearing day.

Employer reasserted its affirmative defenses, except its independent employee action defense. Also, the parties stipulated that if violations were found, there was a substantial probability of serious injury, and that the injured employee's injuries were serious.

The ALJ rendered a Decision on May 27, 2005, denying Employer's appeals of Citations 1 and 2, and granting Employer's appeal of Citation 3. The ALJ concluded the Division established a prima facie case that the IIPP was defective, and that the Employer did not rebut the prima facie case in this regard. She concluded she need not independently review the 350 page IIPP the Division submitted in rendering her decision. She also determined that the evidence established a serious and accident related violation of the Cal/OSHA standard for clearances from energized equipment, 8 C.C.R. § 2940.2(a).

Employer filed a Petition for Reconsideration on July 1, 2005, which was received by the Appeals Board on July 5, 2005. Petitioner asserts the failure to review the 350 page IIPP in its entirety denied it its "day in court," that there is not sufficient evidence of the clearance violation, and that the Citations were issued untimely.

The Board granted reconsideration on August 19, 2005. The Division filed its Opposition on August 30, 2005, and submitted proposed Exhibit 21 therewith. Thereafter, Petitioner submitted a separate motion to strike Exhibit 21 based on purported "ethical" violations. It also submitted a request for sanctions, and a request for a hearing regarding sanctions. The Board granted the Motion to Strike Exhibit 21, and deferred all sanction matters to this Decision After Reconsideration.

EVIDENCE

The Division inspector, Miguel Vargas, Division safety compliance officer Henry Rivera, the injured employee, Pat Quigley, and Employer witnesses, Jeff Kasha and Leo Jordan, provided testimony. They also identified and marked photographs indicating their understanding of the events that preceded the injury to Pat Quigley, that were the subject of the investigation.

On September 30, 2002, employee Pat Quigley, a journeyman electrician, was injured when he received an electric shock while performing maintenance on a power pole. While he was aloft in a bucket truck replacing ground molding that ran from the ground to near the first cross arm of the pole, the employee came in contact with a charged portion of the electrical equipment while using a crowbar to remove damaged molding, thus inadvertently

contacting the underlying ground wire. This contact of both the high voltage wire and the low voltage ground caused a burn injury.

The evidence was in conflict regarding the instructions Quigley received from Supervisor Kasha concerning the replacement of the ground molding. Quigley testified that he understood his instructions to be to replace the entire molding, from the street level to the primary conductor (the line that carried the 4,000 volts of electricity) located on the cross arm. On a previous job with this employer, Quigley similarly replaced ground molding, and that job entailed replacing the entire strip of molding on the pole. He assumed the same procedure applied to this pole. Quigley testified there was no discussion regarding doing only a single piece of molding. There was no discussion regarding the relevant clearance zone (required distance from high voltage components of a power pole, here determined to be 25 inches). Quigley also testified that he understood the endeavor to include Frank (a third crew member) working from the ground and sending materials up to Quigley via hand line while Kasha stood on the ground as safety watch. With this plan in mind, Quigley climbed in to the bucket without donning electricity-protective equipment, and began replacing the molding.

Essentially, the supervisor and the injured worker mis-communicated about how high up the pole Quigley would work. The foreman, Kasha, and a DOSH electrical expert, Henry Rivera, viewed photographs, and agreed the clearance would be violated by changing out the entire molding. The foreman, Kasha, could not specifically recall the instructions he gave Quigley about how much of the molding to change out. The other worker, Frank, also a lineman, participated in changing out the entire molding, which supports Quigley's version of the instructions given by Kasha.

Also, supervisor Kasha agreed there was no discussion about clearance zones during the "tailboard" discussion regarding the molding change out. He stated he did not anticipate Quigley would replace the entire strip of molding. He stated he relied on the experienced journeymen linemen to evaluate hazards as they were encountered, and he did not go in to the bucket to evaluate hazards before work was assigned. He observed from the ground in evaluating hazards. In this instance, he did not watch from the ground during the work, but sat in his truck, out of view of the bucket and the pole, and completed his paperwork for the job. He did not recall how long he sat in his truck, but estimated not more than ten minutes. He could not recall whether he said anything to Quigley when he got out of his truck and observed the bucket within the primary zone (i.e., within 25 inches of the 4000 volt line, known as the "primary" line). He testified he tried to operate the bucket to bring it down after seeing the flash of light when Quigley was shocked. Frank, the other journeyman lineman, lacked sufficient depth perception to do it safely because

he only had vision in one eye. Kasha could not operate the bucket for some unknown reason, but Quigley regained consciousness and drove the bucket down using the aerial controls.

In the course of the ensuing investigation, Vargas requested from the Employer several documents. Employer provided a CD containing a 350 page document purported to be its IIPP. Vargas requested employee training records, but never received any. Vargas reviewed the IIPP, and used a DOSH checklist to verify that needed components were included. During that review he discovered the allegedly missing components. Specifically, he testified that the 350 page IIPP failed to identify a person with authority and responsibility for implementing the plan, that the program lacked methods of abatement for correcting imminent hazards, and that the program did not include needed procedures for training new employees. Based on these events and the document review, the Division witness concluded the plan was deficient.

The 350-page plan was submitted into evidence as Division's Exhibit 12 after the Employer objected to Vargas's testimony as lacking foundation. (The ALJ never specifically ruled on the Employer's objection.) No specific limitation regarding the document's admissibility was articulated by the ALJ at that time. Employer failed to cross examine the Division's investigator on his reading of the IIPP, and failed to provide testimony or an offer of proof showing where the allegedly missing components were located in the plan. Only in closing argument did Employer speak of the IIPP, and therein only argued that "the document speaks for itself."

In her Decision, the ALJ concluded no law required her to review the entire 350 page document in search of the portions the Division witness testified were missing. She also concluded the elements of a violation of Title 8, §2940.2(a) were satisfied, but that the Division failed to establish the elements of the 2940(d) violation, that an observer was required.

ISSUES

1. Did the Division prove Employer was in violation of Title 8 C.C.R 3203?
2. Was there sufficient evidence to conclude Employer knew or should have known that the employee was exposed to a hazard that could result in a serious injury?
3. Were the citations issued timely?
4. Are Board imposed sanctions appropriate for the Division's filing of proposed Exhibit 21 after the matter was submitted for Decision?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Since the record establishes that the IIPP did not identify a person with authority and responsibility for implementing the plan, and lacked methods of abatement for correcting imminent hazards, and Employer did not rebut the evidence, Employer's Appeal of Citation 1 is denied.

a. The Division Established a Prima Facie violation of § 3203(a).

The Division met its burden of proof to establish a prima facie case of a §3203(a) violation. It provided evidence that some required portions of the Employer's written Injury and Illness Prevention Program (IIPP) were missing. Testimony from the Division employee who reviewed the IIPP typically provides that evidence, as was the case here. (*LA County Department of Public Works*, Cal/OSHA App. 96-2470 Decision After Reconsideration (Apr. 5, 2002).) The Division investigator said he reviewed the entire IIPP using a checklist system DOSH uses to evaluate IIPPs, and found three items missing. Specifically, he testified that the IIPP failed to contain 1) the identity of a person with authority and responsibility for implementing the plan, 2) methods of abatement for correcting imminent hazards, and 3) procedures for training employees. The ALJ believed the DOSH witness, and found him credible.

We agree that the Safety Order requires that the IIPP contain the identity of a person with authority and responsibility for implementing a plan, (3203(a)(1)) and that a plan must include written methods of abatement for correcting imminent hazards. (3203(1)(6)(A) and (B)). We do not resolve whether the Safety Order requires the written plan contain *procedures* for providing training and instruction, as the words of the regulation only require the program "provide training and instruction." (3203(a)(7).) However, the Division met its prima facie case by establishing two instances of violating section 3203 through the testimony of its witness.

b. Employer relied on evidence that did not rebut the prima facie case.

Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid such an adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004), citing 1 Witkin, Cal. Evidence (4th.Ed 2000) Burden of Proof and Presumptions §2; see also Evid. Code 550(a); *California Dairies*, Cal/OSHA App. 07-2080, Decision After Reconsideration (Jun. 25, 2009).)

To meet its burden, the Employer offered no additional evidence, nor did it cross examine the division witness to discredit the prima facie evidence of the violation. Rather, defendant relied on the 350 page plan, in its entirety, to

rebut the prima facie case established by the Division. Because the ALJ improvidently admitted the entire document in to the record, without limitation, as discussed in part c. of this Decision, we review the document to determine if it overcomes the Division's prima facie case. We conclude the proffered portions identified by Employer in its Petition for Reconsideration do not constitute the missing IIPP elements. Nor have the missing portions been identified elsewhere in the document. Thus, Employer has not overcome the prima facie case established by the Division.

First, the requirement that a responsible person be identified in the plan is allegedly satisfied by Chapter 3, because it purports to identify the "safety coordinator as responsible for administrating the company's IIPP." [Petition for Reconsideration, page 10]. Chapter three indicates the Pouk & Steinle safety coordinator:

provides all levels of management with the services and technical advice needed for proper administration of the *Pouk & Steinle, Inc.* safety program. This includes advising all levels of management on matters pertaining to safety, establishing a chain of command and providing a network to communicate safety matters within the organization. The *Pouk & Steinle, Inc.* Safety Coordinator insures that the company is in full compliance with applicable Federal State and Local safety regulations. S/He will maintain outside professional contacts and be available for both shifts, if necessary.

This section appears to create an advisory position, not one of authority.

The Safety Order requires "The program shall, . . . at a minimum, [i]dentify the person or persons with authority and responsibility for implementing the Program." (3203(a)(1).) But, Employer's IIPP states that the safety director is only responsible for "provide[ing] service and technical advice" for "all levels of management" to then implement. The IIPP's failure to identify *a person* responsible for implementing the plan means it did not satisfy the requirement in section 3203 that it do so. "All levels of management" are responsible for implementing a plan. This is not a "person," and such diffusion of responsibility for plan implementation does not satisfy the Safety Order. Moreover, this gap in the IIPP means that Employer's contention notwithstanding, there is no evidence that the required element is in the IIPP.

Next, in its Petition for Reconsideration, Employer points to Chapter 17 as rebutting the Division witness's testimony that the plan lacks methods and procedures for correcting unsafe or unhealthy conditions. Chapter 17 is 19 pages long, and states four kinds of inspections will take place. It also contains, within those 19 pages, a 12 page inspection guide in the form of a

checklist, a 5 page hazard evaluation and abatement checklist, and a two page sample hazard assessment form.

The Safety Order states, “[t]he Program shall, . . . at a minimum: Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices, and work procedures in a timely manner based on the severity of the hazard: (A) When observed or discovered,; and (b) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) or property, remove all personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall provide the necessary safeguards.” 3203(a)(6).

Chapter 17 contains no procedures indicating how to *correct* unsafe or unhealthy conditions, which is the deficiency established by the Division. It states that a variety of inspections will occur at the direction of the “Corporate Safety Director”, (P. 17-1) and that the inspector will discuss findings with those responsible for creating and correcting “discrepancies”, and with the “Corporate Safety Director”. The inspector will also “follow up on changes and corrections.” We conclude this falls short of maintaining methods and/or procedures for correcting hazards when observed, based on the severity of the hazard, as required by the Safety Order. It is simply too lax to state that inspections will be as directed by a corporate officer, and to leave it up to the inspector to report and follow-up that corrections occur. And, no procedures exist to correct hazards observed in the field that are not discovered through an ordered, written inspection.

Thus, the two established violations of section 3203 are not rebutted by the 350 page plan. The Appeal is therefore denied, and the penalty of \$750.00 is determined to be reasonable.

c. Although the ALJ improperly declined to review the document once it was admitted without limitation, Board Rules and principles from the Evidence Code did not require her to admit the document as she did.

Although we affirm the result of the Decision after a review of the entire record, we also respond herein to Employer’s claim that the ALJ erred in not reviewing the document. We hold that the ALJ should have exercised her discretion under Board Rule 376.2 to exclude or limit the admission of the document, but that once she did admit it without restriction she was obligated to review the entire document. Although the error below was not reversible error, we review the rules regarding admitting evidence in to the record for the sake of clarity and future guidance to our ALJs.

Board Rule 376.2 states, among other things, that “[t]he Appeals Board may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time.” Here, the ALJ concluded, after the matter was submitted, that review of the 350 page IIPP necessitated an undue consumption of time. She should have made this determination before admitting it and excluded it when it was offered. (*Matarozzi-Pelsinger Builders, Inc.*, Cal/OSHA App. No 01-1400 Decision After Reconsideration (August 12, 2004).) At that point in the hearing, the Division witness was testifying about the items that were missing from the document. The ALJ could have concluded that a review of the document would simply yield the same conclusion as the witness testified under oath that it would, specifically, that the items were missing. If she believed reading it would not yield additional information, she should have stated that she was not going to admit it because it was not clear that the probative value of the document, given the testimony of Vargas, justified the consumption of time required to review the entire document. (*Id.*)

When exercising her discretion to weigh the probative value of the document against the consumption of time required to review the document, the ALJ can elicit offers of proof from both parties as to the probative portions of the document. (*Lusardi Construction Company*, Cal/OSHA 86–318, Decision After Reconsideration (Oct. 29, 1986); *Crown City Plating Co.*, Cal/OSHA App. 92-052 Decision After Reconsideration (Nov. 18, 1994).) Then, she can determine its probative value *before* admitting it in to evidence. (Board Regulations 350.1(a) and 376.1(d); *Duke Timber Construction Co.*, Cal/OSHA App. 81-347 Decision After Reconsideration (Aug. 19, 1985).) While the Board and its ALJs are not bound by the technical rules of evidence, the Board has traditionally relied on the California Evidence Code for guidance.¹ The Evidence Code instructs that the *parties* are obligated to articulate the relevance of any evidence upon which they rely for proof of any fact needed to meet any burden of proof. (Cal. Evid. Code, §§350 – 406.) ALJs may require parties relying on any evidence, either submitted by them or their opponent, to articulate the relevant portions of any such evidence. (Board Regulation 350.1(a); Cal. Evid. Code, §§352, 355, 356.)

After asking the parties to articulate the probative value of a document, or portion thereof, the ALJ may impose reasonable limitations as to what portions are admissible and/or for what relevant purposes. (e.g., Cal. Evid. Code, §355, 403.) If a determination as to the probative value cannot be made after offers of proof have been requested, the ALJ may call witnesses or request additional briefing on the issue, as needed. An ALJ may also admit evidence for a limited purpose if she wishes to review the evidence only for a particular

¹ *Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268 et.al., DAR (Feb. 18, 1998)

purpose. (*Lail v. Lail* (1955)133 Cal.App.2d 610.) And, under Evidence Rule 403(b), an ALJ may conditionally admit a document, or other evidence, pending a determination of its relevancy and admissibility. “Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of trial.” (Cal. Evid. Code, §403(b).)

Here, the Employer objected to Vargas’s testimony regarding the contents of the IIPP, asserting the testimony lacked “foundation.” Vargas’s testimony was the “proffered evidence.” The objection for lack of foundation could have been held in abeyance until Vargas’s testimony, including cross-examination, was completed. If the evidence did not establish its own foundation, i.e. reveal it was based on personal observation of the IIPP, then the Division would have been obligated to offer the evidence that provided the foundation, that is, the written program.

In lieu of formally ruling on Employer’s “foundation” objection, the ALJ agreed to simply enter the 350 page plan in to evidence. The evidence rules do not require such a result. After hearing Vargas’s testimony, and conditionally admitting the testimony, she could have determined there was no basis to question its foundation, so admitting the 350 page IIPP was unnecessary for that reason. Or, if she concluded the testimony lacked foundation, she could have admitted the document for the limited purpose of providing foundation for Vargas’s testimony. If Employer later offered it as its own business record, the ALJ could have required Employer to be specific as to the material portions of the IIPP, given the Division’s prima facie evidence of the defects in the IIPP. (Board Regulation 376.2) The material portions of the document would have been identified, and those portions could have been admitted, rather than the entire 350 page document. Thus, there are many tools available to an ALJ to assure a fair and manageable record is created in each case.

After the matter is submitted for decision, the ALJ reviews all evidence admitted for purposes of weighing the evidence, drawing permissible inferences, and ultimately rendering a decision. (Board Regulation 385(a).) An ALJ can decide that evidence is not convincing after reviewing it, but she cannot elect to not review it once it has been admitted. If evidence is admitted with limitations, the ALJ must review it for at least the limited purpose for which it was admitted.

Here, the ALJ admitted the entire IIPP into evidence without limitation. Employer argues that the ALJ should have reviewed the document to evaluate Employer’s contention that the IIPP was complete.

Although she should have reviewed it after admitting it, the failure to consider relevant evidence only requires reversal if, in addition to other procedural requirements not at issue herein, the error resulted in a miscarriage of justice. (Cal. Evid. Code, §354; *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal. App. 4th 1011). We apply this standard when considering whether an ALJ's failure to consider evidence requires reversal.

Since the record fails to establish that the omitted evidence would have been dispositive, we decline to reverse the Decision in this regard. (See, *Arthur J. Brewster Corp dba Prestige Kitchen, Inc.*, Cal/OSHA App. 08-1121, Denial of Petition for Reconsideration (Jul. 25, 2008).) Rather, the record contains substantial evidence to support the ALJ's ruling that section 3203(a) was violated.

II. Serious Classification for Violation of section 2940.2(a) is supported by the record and affirmed.

The Employer stipulated that, if violations were found with respect to Citations 2 and 3, they constitute hazards with a substantial probability of death or serious bodily harm. It is Employer's position in its Petition for Reconsideration that it neither knew nor should have known of the exposure, and that for this reason Citation 2 should be reclassified as General.

A serious classification has been proven by the Division if there is a substantial probability that death or serious injury could result from a violation, unless an employer shows that it did not, and could not with reasonable diligence, know of the violative condition. (Lab. Code, §6432; *Nibbelink Masonry Construction Corp.*, Cal/OSHA App. 02-1399, Decision After Reconsideration (Dec. 20, 2007).)

After reviewing the record, we conclude the ALJ properly weighed the evidence and applied the proper legal standard when she concluded that the Employer failed to produce evidence that it could not have known, through the exercise of reasonable diligence, that an employee would enter the energized zone, in violation of section 2940.2(a). The Employer, through its supervisor, instructed the employee to replace molding that extended in to the energized zone. The Employer failed to either recognize the hazard, though it was visible from the ground, or to effectively communicate to the employee to stay away from the hazard.

As previously noted, the Board has held that an employer may defend against a serious classification based on an employee's unforeseeable decision to exceed the scope of his assignment, because it can serve to prove that the employer lacked knowledge

of the violation, and could not have learned of the violation through the exercise of reasonable diligence. *Andersen Tile Co. supra; Napa Pipe Corp., Cal/OSHA App. 90-143, Decision After Reconsideration (Apr. 18, 1991)*; see also, California Labor Code section 6432(b). [FN12]. Employer bears the burden of proof on this issue. *Id.*

(*Bay Area Systems & Solutions dba BASS Electric, Cal/OSHA App. 01-106, Decision After Reconsideration (Oct. 10, 2008).*)

In *Bay Area Systems, supra*, also an electrical injury case, the evidence established the employer gave clear instructions to the injured employee to avoid any energized wires. The employee's disregard of this clear mandate exposed the employee to a violation that the employer could not have known about. Here, however, Employer did not give clear instructions regarding the scope of the work. The record supports the conclusion that the supervisor failed to give clear instructions, and left it up to the employee to identify and avoid hazards. This is an abrogation of the Employer's duty to be diligent in identifying hazards.

Since the Employer failed to meet its burden of proof regarding any inability to identify the hazard with the exercise of due diligence, the serious classification is proper. We affirm the Decision in this regard.

I. The Citations were issued within six months of the Division receiving a report of the injury and are therefore timely under Labor Code § 6317.

The face of the Citations, and a copy of the mailing envelope, admitted in to evidence as Exhibit 1, indicate they were issued on March 26, 2003. A citation is issued the day it is signed, dated, and mailed by the Division. (*Pierce Enterprises, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002)* [the issuance date appearing on the face of the citation, combined with the dated certified mail envelope bearing the same date was sufficient evidence of the issuance date of a Citation].) Labor Code section 6317 requires this be done within six months of the occurrence of the violation. Service thereafter must be within a reasonable time. (Lab. Code, 6319.)

Labor Code Section 6319(a) requires the Division to “notify the employer by certified mail of the citation or order” The test to be applied in determining whether service is proper is whether it was reasonably calculated to provide an employer with knowledge of the citation. (See *Pacific Bell, OSHA App. 92-9060, Denial of*

Petition for Reconsideration (Feb. 26, 1993.) The Division must issue citations with reasonable promptness. (Labor Code § 6317.)

(*Pro Services*, Cal/OSHA App. 93-9018, Denial of Petition for Reconsideration (Jul. 28, 1993).)

Vargas testified that he contacted Employer to conduct a closing interview, that he notified Employer at that time as to the nature of the Citations and the appeal process, and then he mailed the Citations, which were dated March 26, 2003. In addition, the Division submitted photocopies of the envelope, and certified mail receipt, mailed to Pouk & Steinle at 2520 Rubideaux Street, Riverside, CA 92519, on March 26, 2003. Thus, the Division has met its initial burden of proving the Citations were issued within six months of the violation.

In addition to this evidence of mailing which helps establish the issuance date, Exhibit 1 also includes a declaration of personal service by Vargas on Pouk & Steinle, at 2520 Rubideaux Boulevard, Riverside, CA 92519, on April 1, 2003. The reasonable inference to draw from the second attempt at service is that there was some failure in the first attempted service. However, the personal service was timely and satisfies Labor Code section 6319 because it occurred within a reasonable time (six days after the citations were issued). This receipt date begins the period in which Employer has to file or at a minimum initiate its appeals. (*Club-Fresh LLC*, Cal/OSHA App. 06-9241, Decision After Reconsideration (Sept. 14, 2007).) The receipt date is not relevant to determining the issuance date for purposes of Labor Code section 6317. Rather, the certified mail document and accompanying envelope corroborate the *issuance* date as it appears on the Citation itself.

There is no authority for the assertion by the Employer that a citation is “issued” when received. There was no testimony from the Employer indicating it did not receive the certified mail copy of the Citations.

The Division met its burden of proof establishing the Citations were issued within six months of the occurrence of the violation. Employer failed to rebut this *prima facie* case. Since there is sufficient evidence in the record to conclude the Citations were issued timely, we decline to reverse the Decision in this regard.

II. Sanctions under Board Regulation 381, or otherwise, will not be imposed.

Petitioner requested both a hearing regarding sanctions, and sanctions, for “unethical” actions on the part of the Division representative. Petitioner

claims the attempt to submit Exhibit 21 as an attachment to the Division's Answer to the Petition for Reconsideration was unethical and thus sanctionable. (Exhibit 21 was a photocopy of the original envelope in which the citations were mailed that bears the stamp mark "return to sender Riverside Calif unclaimed".)

The Board, as a quasi-judicial body, has inherent authority to manage the proceedings before it, and we decline to schedule a hearing regarding sanctions in this case for two reasons. First, Board Regulation 381 does not empower the Board to impose sanctions after the matter has been submitted for Decision pursuant to Rule 385. (*Yellow Freight Systems, Inc.*, Cal/OSHA App. 95-4592, Decision After Reconsideration (Jul. 23, 1999).) That hour has long passed.

And, second, the Division's conduct in offering the untimely rebuttal evidence was not wholly unreasonable under the circumstances. The Division was responding to a Petition for Reconsideration. The Employer's petition asserted "the Division offered no testimony regarding whether Citation 2 was, indeed, issued or served that date [3/26/2003]." This misstates the evidence. Mr. Vargas testified that he called the employer before he issued and mailed the citations as indicated in Exhibit 1. This provided foundation for Exhibit 1, which bears the issuance date of 3/26/2003, and the postal meter mailing date of the Certified mail envelope bearing the same date.

Employer also failed to cite precedents that clarify the governing statute. Employer's petition conflated the legal effect of the issuance date and the service date, as Employer attempts to do in the above quoted language. These are two distinct statutory requirements. (Lab. Code, §§ 6317 and 6319; *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002); *Club-Fresh*, *supra.*) In order to rebut the prima facie case of timely issuance established by the Division, Employer needed to provide some evidence **during the hearing** that the citation was not sent through the certified mail letter evidenced in Exhibit 1. (*Pierce*, *supra.*) Testimony that the Employer did not receive the mailed citations could have provided some evidence that they were not sent. Rather than provide evidence germane to the *issuance* date, the Employer sat silent throughout the hearing, and then alleged a late issuance based on the date the citations were received.

In light of the lack of litigation of this issue at the hearing, and the inappropriate blending of the separate statutory provisions regarding *issuance* and *service* of Citations, the Division attempted to rebut the late raised inference of non-issuance/service with new evidence. Neither Employer's raising of the issue nor the Division's response are appropriate. We decline to consider Exhibit 21, and we decline to award sanctions.

DECISION AFTER RECONSIDERATION

We therefore deny the Employers' Appeal as to Citation 1, and assess a penalty of \$750.00. We deny Employer's Appeal of Citation 2, and assess a penalty of \$22,500.00.

We affirm the grant of employer's Appeal of Citation 3.

We deny Employer's motion for sanctions.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
DATED: JUNE 10, 2010