

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

In the Matter of the Appeal of:

SIERRA FOREST PRODUCTS
P.O. Box 10060
Terra Bella, CA 93270

Employer

Docket. 09-R2D5-3979

**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 the petition for reconsideration filed by the California Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 1, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Terra Bella, California maintained by Employer. On November 23, 2009 the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Serious violation of section 3314(c)(1) [failure to ensure use of extension tools to clear conveyor].

Employer filed a timely appeal of the citation.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on April 5, 2012. The Decision granted Employer's appeal.

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

The Division timely filed a petition for reconsideration of the ALJ's Decision on May 10, 2012. Employer filed an answer to the petition. The Board took the Division's petition under submission, and filed an Order of Remand on August 9, 2012, directing the ALJ to conduct further proceedings to determine whether the Division should be allowed to amend the citation to conform to proof, or if Employer would be prejudiced by such amendment.

On November 30, 2012, the ALJ issued a Decision After Remand, holding that Employer had shown it would be prejudiced by the proposed amendment of the citation. The ALJ denied the Division's motion to amend. The Division timely filed a petition for reconsideration of the Decision After Remand. Employer filed an Answer to the petition.

ISSUES

- (1) Did Employer show it would be prejudiced if the motion to amend the citation were to be granted?
- (2) Should the Division's motion to amend the citation be granted?

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered DOSH's petition for reconsideration and the Employer's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Division petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e).

The Division was notified of an injury at Employer's workplace and commenced an investigation shortly thereafter. The Division's representative and only witness at hearing, Albert Ordway (Ordway), stated that he was

provided documents related to the injury investigation and information regarding the type of injury from Employer's human resources representative, a Mr. Lovelady. Ordway testified that Employer's investigation papers (which were not introduced into evidence) described the injured employee as having not followed company rules, as he had not turned off the machine or used an extension tool when injured by the conveyor belt. Ordway then introduced a series of photographs, one of which was of the lockout/tagout tags for the belt. (Ex. 6). Ordway stated he was told by Employer where the circuit breaker to the belt was, and how the belt could be de-energized and tagged. The Division then rested, and Employer, calling no witnesses, rested after a closing statement.

Ordway had issued a citation to Employer which reads in full:
8 CCR: 3314(c)(1) The Control of Hazardous Energy for the
Cleaning, Repairing, Servicing, Setting-Up, and Adjusting
Operations of Prime Movers, Machinery and Equipment, Including
Lockout/Tagout

(c) Cleaning, Servicing and Adjusting Operations.

Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

(1) If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (eg., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

The employer did not insure that employees use extension tools to clear conveyor belts to prevent injuries from the moving conveyers. On 5-27-2009, an employee clearing the chipper conveyor sustained a serious injury, due to this violation.

The ALJ's original decision correctly found that the Division did not prove a violation of section 3314(c)(1). The Division's presentation did not suggest that the conveyor belt at issue needed to be kept in motion while being serviced or

adjusted, and some evidence was submitted regarding lockout and tagout of the conveyor belt.

The Division submitted a petition for reconsideration, requesting that the citation be amended to allege a violation of section 3314(c), rather than (c)(1). The language of section 3314(c), as appears above, requires disengagement and de-energizing of equipment while cleaning, servicing or adjustment procedures are taking place. The Board granted the petition and remanded to the ALJ, to consider if such a motion to amend would prejudice Employer. The ALJ found that Employer had demonstrated prejudice: Employer argued that the Division focused solely on section 3314(c)(1) at hearing, and at hearing Employer had presented no witnesses on its own behalf due to the limited nature of the Division's case in chief.

Employer now argues in its answer to the Division's petition that it has been prejudiced by the passage of time, and the lack of opportunity to defend against a section 3314, subdivision (c) violation at the hearing. However, Employer's discussion fails to offer any specific showing of prejudice. Prejudice will not be presumed but must be affirmatively demonstrated through production of evidence. (See, *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624). "It is established, furthermore, that if a case is actually tried on the theory which is later added by an amendment to the pleadings, the adverse party suffers no prejudice from the variance. (See *Chelini v. Nieri* (1948) 32 Cal.2d 480, 486 [196 P.2d 915]; *McAllister v. Union Indem. Co.* (1935) 2 Cal.2d 457, 459 [32 P.2d 650, 42 P.2d 305]; *Hayes v. Richfield Oil Corp.* (1952) 38 Cal.2d 375, 382 [240 P.2d 580].)" *Conolley v. Bull* (1968) 258 Cal.App.2d 183, 193.)

Employer also reiterates the argument it made before the ALJ--that it failed to present its witness during the course of the hearing, as his testimony was not needed to defend or refute the original allegations, and Employer would therefore be prejudiced if the citation were to be amended. As discussed above, this in and of itself does not constitute a showing of prejudice. The record can be re-opened for Employer's witness to testify, if Employer demonstrates that reopening the record for is required. (See, *Simone v. McKee* (1956) 142 Cal.App.2d. 307, 314-315.) However, if Employer's witness is no longer available, due to death or some other factor, it is incumbent upon the party asserting prejudice to "demonstrate [witness] unavailability in the event such further proceedings are required."² (*Hadley v. Superior Court* (1972) 29 Cal.App.3d 389, 395 [Prejudice not found where City asserts witnesses have retired "and are no longer available."]) California courts may find prejudice where there is a demonstration of "loss of material witnesses due to lapse of

² The Board, as an administrative adjudicative body, has no mandate to "impose rules of pleading and proof more stringent than those followed in civil actions." (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 214.)

time or loss of evidence because of fading memory attributable to the delay." (*People v. Catlin* (2001) 26 Cal.4th 81, 107, quoting *People v. Morris* (1988) 46 Cal.3d 1, 37). No loss of evidence or unavailability of witnesses has thus far either been alleged or demonstrated in Employer's answer.

Finally, Employer suggests that the proposed amendment is not an appropriate use of the Board's authority. On this point, the Board directs the parties to Government Code section 11516, which provides that if the Board finds an employer prejudiced by the amendment of the citation, the Board may then cure that prejudice by continuing the proceeding to allow introduction of additional evidence. The Government Code and associated Board rules of practice and procedure are not unlike the liberal allowances granted to conform to proof in California civil actions; "a trial court may permit an amendment to a complaint to conform to the proof at any stage of the trial even after submission of the cause unless the amendment introduces a new and independent cause of action." (*Sandvold v. Perrot* (1946) 74 Cal.App.2d 344, 349 citing *Burrows v. Burrows* (1936) 18 Cal.App.2d 275, 279; *Union Lumber Co. v. J. W. Schouten & Co.* (1914) 25 Cal.App. 80, 82). The Board therefore has been granted statutory authority to approve an amendment such as the one requested by the Division.

Although the Board does find the ALJ erred in making a finding of prejudice, we also are concerned that the Division, in its request for the amendment of the citation, has failed to explain the unusual delay in its motion to amend. The Board may grant or deny an amendment at its discretion, and in this instance, where the Division has not accounted for the cause of the delay in its request to amend, the Board is disinclined to allow such an amendment at this late point in the proceedings. (*Duchrow v. Forrest* (2013), 215 Cal.App.4th 1359, 1377 ["Courts must apply a policy of liberality in permitting amendments at any stage of the proceeding, including during trial, when no prejudice to the opposing party is shown. ... 'However, " 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' " ' "] (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345 [119 Cal.Rptr.3d 253], citation omitted; accord, *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 [41 Cal.Rptr.3d 754].) "Thus, [if the trial court denies a motion to amend during trial,] appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is "offered after long unexplained delay ... or where there is a lack of diligence" ' "] (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175 [59 Cal.Rptr.3d 672].)

The Board reiterates that the rule allowing amendment of the issues on appeal is permissive, and the Board may decline to amend, at its discretion. (Rule 386). We deny the amendment in this instance: although no prejudice to Employer has been demonstrated, the initial burden is on the Division to

describe the cause of the delay in bringing its motion. The Decision of the ALJ vacating the citation is upheld, but for the reasons described herein.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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