

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

L & S CONSTRUCTION, INC.
674 NORTH BATAVIA ST.
ORANGE, CA 92868

Employer

Docket No. 10-R3D1-1821
and 1822

**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 L&S Construction, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 28, 2010, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Villa Park, California maintained by Employer. On April 29, 2010 the Division issued two citations to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a General violation of section 1509, subsection (a) [Illness and Injury Prevention Program (IIPP) not maintained], 3395, subsection (e)(3) [lack of written heat illness prevention procedures] and 1541, subsection (j)(2) [lack of protection from material falling into excavation]. Citation 2 alleged a Serious violation of section 1541.1, subsection (a)(1) [no cave-in protection].

Employer filed timely appeals of the citations.

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 14, 2011, affirming the violations. The Decision amended the classification of Citation 2 from serious to willful serious. The penalty was raised from \$4950 to \$61,875, for total penalties of \$62,970.

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

On May 5, 2011, the Board on its own motion issued an Order of Reconsideration for Citation 2, to consider whether the ALJ was required to give the parties notice of the intended amendment of the citation's classification from serious to willful serious and the subsequent penalty increase, under section 386. On May 17, 2011, Employer filed a petition for reconsideration, which the Board took under submission on June 15, 2011.

On February 2, 2012, the Board, on its own motion, issued an Order of Remand to the ALJ for further proceedings. The Order granted Employer the opportunity to show if prejudice would result from the proposed amendment of the classification under section 386. Following the Order, the ALJ provided notice to the parties on April 30, 2012, allowing each to demonstrate if prejudice would result from the proposed amendment. The Division did not respond. Employer timely filed a response, stating that it would have presented additional evidence to dispute the elements of a willful violation, and was therefore prejudiced by the proposed amendment.

The ALJ found that under Government Code section 11516 and prior Board decisions, should Employer demonstrate prejudice, a hearing shall be set to cure. The ALJ found prejudice, and ordered the hearing to be reopened to allow Employer an opportunity to introduce additional evidence on the issue of reclassification of the violation.

Employer timely filed a petition for reconsideration of the ALJ's Order on October 15, 2012. The Division filed an answer to the petition. The Board took Employer's petition under submission, and ordered that the Order After Remand Reopening the Record of the ALJ be stayed pending this decision after reconsideration.

ISSUE

Did the ALJ Correctly Apply Section 386 and Government Code 11516 by Ordering the Reopening of the Record to Allow Employer to Introduce Additional Evidence on the Issue of the Reclassification of the Violation?

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 Employer's petition for reconsideration and the Division'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.

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

The ALJ's April 14, 2011 Decision amended the classification of Citation 2 from serious to willful serious. The amendment was authorized under the Board's rules of practice and procedure, as well as the Government Code.² However, in this instance, the ALJ failed to provide parties notice of the post-submission amendment; to cure the defect, the Board ordered the ALJ to provide notice of an intent to amend and opportunity to show prejudice unless the case is reopened to permit the introduction of additional evidence, per Government Code section 11516.³ Should either party be prejudiced by the proposed amendment of the citation, the prejudice may be cured by continuing the proceeding to allow introduction of additional evidence. (Government Code section 1516; *Sierra Forest Products*, Cal/OSHA App. 09-3979, Decision After Reconsideration (Apr. 8, 2016), *G.T. Alderman*, Cal/OSHA App. 05-3523, Decision After Reconsideration (Nov. 22, 2011).)

Employer filed a petition for reconsideration of the ALJ's order after remand that argues several points: Employer first argues that the ALJ exceeded the scope of the Board's order of remand, by ordering the record to be reopened and scheduling a further hearing after determining Employer had established prejudice. The Board's order granted the ALJ the opportunity to "affirm or amend her decision as appropriate." (*Order of Remand*, Docket No. 10-R3D1-1822 (Feb. 2, 2012).) The ALJ determined that to cure prejudice, further proceedings were required; the ALJ's reopening of the record did not constitute error.

Employer also argues that while the Board has a responsibility to comply with the Labor Code, its rejection of *Marin Storage and Trucking, Inc.*, Cal/OSHA App. 90-148, Decision After Reconsideration (Oct. 25, 1991)—a Board decision which found that an ALJ engaged in error by notifying the parties of his intent to amend a citation's classification, and then amending

² The Board has a mandate to be consistent with Government Code sections 11507 and 11516, under section 6603 of the Labor Code. (*G.T. Alderman*, Cal/OSHA App. 05-3513, Decision After Reconsideration (Nov. 22, 2011).) The Appeals Board's rules of practice and procedure must be consistent with those sections; the Government Code, at sections 11507 and 11516, allows for the amendment of accusations in administrative proceedings such as those of the Appeals Board, both during a proceeding and after submission for decision, if so ordered by the tribunal.

³ Government Code section 11516 states: The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

after holding additional proceedings— was based on unsound logic. The Board disagrees. The Board, having reviewed the history and authority for sections 317, 371.2 and 386, interprets these regulations as authorized by the Labor and Government Codes to allow for amendment of citations and appeals where appropriate.⁴ (*Duininck Bros., Inc.*, Cal/OSHA App. 06-2870, Decision After Reconsideration & Order of Remand (Apr. 13, 2012).) A prior Decision After Reconsideration such as *Marin Storage and Trucking*, which did not interpret Board regulations in light of the mandate of governing statutes, should not be relied upon for guidance, and we decline to follow its logic. (See, *People v. Berks* (1998) 19 Cal.4th 108, 117, citing, *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924 [“[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.”])

The Board also takes into consideration the occurrence and approval of such amendments at the Federal Occupational Safety and Health Review Commission, the entity analogous to the Board in the Federal OSHA system, and the federal circuit courts of appeals, as detailed below. The Board has acknowledged the similarity between its role and the Federal Commission, and in decisions after reconsideration occasionally turns to Federal Commission decisions for guidance, even if it is not required to do so. (*California State Dept. of Forestry*, Cal/OSHA App. 1378 Decision After Reconsideration (Aug. 28, 1986) [“The Appeals Board's statutory role within the Cal/OSHA program is similar to that of the Review Commission's within the Federal program.”]) Reviewing California courts have also found Federal Commission interpretations to be useful, if not dispositive, in their review of Board decisions. As an example, in untangling the meaning of “willful” in *Rick's Electric v. Occupational Safety & Health Appeals Bd.*, the Court of Appeal reviewed at length various federal cases, and ultimately concluded, “(t)he reasoning of these federal cases applies equally well to the use of the term “willful” in Cal/OSHA[.]” (*Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1036. See also, *Vial v Occupational Safety & Health Appeals Bd.* (1977) 75 Cal.App.3d. 997.)

The Federal Commission has long allowed for sua sponte amendments to the pleadings to conform to the evidence, where there is no prejudice to the parties.⁵ (See, *Mineral Indus. & Heavy Constr. Group v. OSHRC* (5th Cir. 1981) 639 F.2d 1289 [ALJ sua sponte amendment upheld on review as proper, no

⁴ Section 386 has been amended as of July 1, 2013. We apply the pre-amended rule in this Decision.

⁵ The Federal Commission grounds this policy in Rule 15(b) of the Federal Rules of Civil Procedure, which provides the ability to amend and cure prejudice through continuance in a similar fashion as the California Government Code's Sections 11507 and 11516. “(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

prejudice]; *A.L. Baumgartner Construction, Inc.*, OSHRC Docket No. 92-1022 (Sept. 15, 1994), *Kaiser Aluminum and Chemical Corporation*, OSHRC Docket No. 3685 (May 3, 1976); *Morrison-Knudsen Co, Inc./Yonkers Contracting Co., Inc., a JV*, OSHRC Docket No. 88-572 (Apr. 20, 1993).) The Federal Commission's liberal allowance of amendment of the pleadings has been reviewed by federal courts of appeals over several decades, and provides instructive guidance for the Board's purposes. (*Noblecraft Industries v. Secretary of Labor* (9th Cir. 1980) 614 F.2d 199, 205-206.) The objective of this accommodating amendment policy has been described by the Fifth Circuit Court as follows:

Liberal construction and easy amendment of pleadings are accepted procedure in an administrative law context. Administrative tribunals, as well as courts, have often heeded one commentator's advice that "(t)he most important characteristic about pleadings in the administrative process is their unimportance." 1 K. Davis, *Administrative Law* 523 (1958). (*Morgan & Culpeper, Inc. v. OSHRC* (5th Cir. 1982) 676 F.2d 1065, 1066.)

The Board finds this logic to be applicable to its own proceedings, and to reflect the uncomplicated amendment procedures of Government Code sections 11507 and 11516.

We also consider section 6602 of the Labor Code; the Labor Code grants the Board statutory authority to hold a hearing, and thereafter issue a decision, "based on findings of fact, affirming, modifying, or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief."⁶ This authority closely mirrors language granting the Federal Commission authority to review the Secretary's proposed penalty. Federal courts have long understood this corresponding federal authority as providing the Federal Commission with the right to de novo review of all penalty assessments. De novo review means that an employer must weigh the risks and rewards of appeal, as the Federal Commission has the authority to increase the fine, as well as to decrease or vacate it:

An employer may accept the citation without protest if he chooses to do so, but in our view if he chooses to contest the matter before the Commission, he does not have any vested right to go to trial on the specific charge mentioned in the citation or to be free from exposure to a penalty in excess of that originally

⁶29 USC 659(c) governing Federal OSHA appeals, uses much the same language as the Board's Labor Code section 6602: [...] [T]he Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, **affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief**, and such order shall become final thirty days after its issuance. [...] [Emphasis added.]

proposed. (*Long Mfg. Co. v. OSHRC* (8th. Cir. 1977) 554 F.2d 903, 907 [Change from “repeated violation” to “failure to correct” with increased penalty proposed by Secretary and allowed by ALJ].)

Correspondingly, the Board’s interpretation of Labor Code section 6602, as granting the Appeals Board with the responsibility and authority to conduct a de novo review of penalties that are proposed by the Division, has support not only in the plain language of the statute, but in analogous Federal OSHA legal authority. (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 934 [“If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.”]) The Board has long exercised this authority to modify the Division’s proposed penalties in a variety of scenarios, including employer appeals for penalty relief from the Division’s proposed penalties. (*Maria de los Angeles Colunga dba Merced Farm Labor*, Cal/OSHA App. 08-3093, Decision After Reconsideration (Feb. 26, 2015).)

While the Court of Appeal in *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891 found significant procedural flaws with the administrative code relied upon by that county to justify its imposition of significantly increased penalties in an administrative appeal, the Board’s authority in the Labor Code to amend the Division’s proposed penalties is clearly stated. (Labor Code section 6602.) Moreover, the Board’s interpretation of its authority as granted by the Labor Code to amend proposed penalties is consistent with longstanding interpretations of nearly identical authority held by the Federal Commission to amend the Secretary’s proposed penalty, as well as to generally conform citations to the proof presented at hearing. By providing for adequate notice of proposed amendments consistent with the Government Code, and the opportunity for either party to demonstrate and cure any alleged prejudice that may arise as a result of amendments, no due process harms can be said to result through the Board’s allowance of such amendments, including the amendment at issue in this appeal, which may result in an increased penalty. (See, Government Code sections 11507 and 11516.)

DECISION

The Board finds that the ALJ did not commit error or exceed the scope of her authority by ordering further proceedings to allow Employer the opportunity to any potential prejudice created through amendment of the citation. The ALJ's Order After Remand Reopening the Record is affirmed. The matter is returned to hearing operations for further proceedings.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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