

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

In the Matter of the Appeal of:

CITY OF LOS ANGELES;  
HOUSING AUTHORITY [HACLA]  
2600 Wilshire Blvd  
Los Angeles, CA 90057

Employer

Docket No. 05-R4D2-2541

**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 this matter under reconsideration<sup>1</sup>, renders the following decision after reconsideration.

**JURISDICTION**

On June 20, 2005 the Division of Occupational Safety and Health (Division) issued to City of Los Angeles Housing Authority [HACLA] (Employer) Citation 2, alleging one willful violation of section 1529(k)(3)(A) of Title 8, California Code of Regulations. Employer filed a timely appeal asserting the safety order was not violated, the classification was incorrect, and that the proposed penalty was unreasonable.

This matter was considered at a scheduled hearing before an Administrative Law Judge (ALJ) for the Board on October 11, 2007. At the hearing, the ALJ noted the citation appeared to be defective as it alleged a "Willful" violation without further stating whether the violation was Regulatory, General or Serious. At the hearing, and in her written Decision of October 30, 2007, the ALJ concluded the citation did not allege a violation because its classification was insufficient. She granted Employer's appeal and vacated the penalty *sua sponte*.

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<sup>1</sup> The matter was taken under reconsideration on the Board's own motion on November 29, 2007, and the Petition for Reconsideration filed by the Division of Occupational Safety and Health was taken under submission on January 22, 2008.

On November 29, 2007, the Board ordered reconsideration to determine if the ALJ's dismissal of the citation was proper.

The Division answered the order of reconsideration and filed a petition for reconsideration on December 4, 2007, which was taken under submission. Employer answered the order of reconsideration on December 26, 2007.

### **EVIDENCE**

Although no evidentiary hearing was held, items were submitted in to the record as exhibits, and the parties advanced numerous arguments in the various briefs, all of which we have considered. The citation was delivered to Employer with a letter explaining the citations and the assessed penalties. The citation contained the word "Willful" on its face, referenced Title 8, Cal. Code Regs. section 1529(k)(3)(A), and described a violation as:

At the time of inspection, it was determined that the employer's tile setters were assigned to remove vinyl floor tiles that had asbestos-containing mastic attached to them, at 230 West Third Street, Unit 215, San Pedro, on 3/7/05 and that the employer did not identify the presence, location, and quantity of ACM, and or PACM therein pursuant to section (k)(1) of this section before the work in the area began."

The letter, entitled "Citation and Notification of Proposed Penalty" referenced the citation as "willful violation, general" followed by "8 C.C.R. 1529(k)(3)(A)." The stated penalty in both documents was \$5000.00, the lowest allowable penalty for a willful violation.

At the hearing on October 11, 2007, the ALJ dismissed the citation because she concluded the omission of a classification of either Regulatory, General or Serious, in addition to the Willful classification appearing on the face of the citation, rendered the citation defective and unsuitable for amendment.<sup>2</sup>

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<sup>2</sup> The ALJ was also presented with a motion from Employer, on the day of the hearing, to amend its appeal to allege Independent Employee Action Defense. Relying on Tit. 8, Cal. Code Regs sections 371.1 and 371, she denied the motion as untimely, concluding Employer did not establish good cause for bringing the motion to amend its appeal later than 20 days before the hearing date. We decline to consider the correctness of this ruling since our decision herein remands the matter for further hearings, thus rendering moot the timing of Employer's motion.

## ISSUE

Was the citation valid?

### REASONING AND DECISION AFTER RECONSIDERATION

The ALJ granted Employer's appeal and dismissed the citation in reliance on a rule requiring that the classification of a violation appear on the face of the citation. We have reviewed the enacted statutes and regulations, and can find no such requirement mandating the dismissal of the citation under the circumstances here, where a partial classification appears on the face of the citation. As set forth herein, there appears to be no such rule in the Labor Code nor in the Cal. Code of Regulations, Title 8, requiring the "classification" appear on the face of the citation. The Division does, and did in this case, issue citations and notices of penalty together. (See Division Policy and Procedure Manual, section C-2). It also typically includes the classification on the citation. We agree such practice is consistent with the Labor Code and implementing regulations, but it is not mandated by them. We set forth the various enactments to clarify how we reached this conclusion.

Labor Code section 6317 describes the components of a valid citation, among other things.

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the alleged violation.

(Labor Code § 6317, first paragraph.) This is the only portion of the Labor Code containing the specific components of a valid citation. The next paragraph of section 6317 clarifies that the Division is not required to issue a citation for every violation of a safety order. It may, in certain circumstances, issue a Notice in Lieu of Citation, the propriety of which depends on the classification ascribed to the violation. It states, "[u]nder no circumstances shall a notice be issued in lieu of a citation if the violations are serious, repeated, willful, or arise from a failure to abate." (*Id.*) This section describes the *violations* as having classifications, not the *citations*. All but the first paragraph of section 6317 delineate when a citation versus a notice in lieu of citation is to be issued.

The regulations also contain requirements for issuing citations. Title 8, Cal. Code of Regs. section 332 states:

The citation shall set forth:

- (a) The name of the employer, the employer's address and the workplace inspected;
- (b) The nature of the violation, in specific terms with reference to the provision of the code, standard, regulation or order alleged to have been violated;
- (c) Time allowed for correction of violations;
- (d) Rights of employees respecting the time fixed for correction of the violation;
- (e) Posting requirements;
- (f) Time within which an employer may contest a citation; and
- (g) Such other information as the Division of Occupational Safety and Health deems appropriate for clear understanding of the form issued.

From these provisions we conclude there is no requirement in either the statute or the regulation that the "classification" be specified on the face of the citation in order for it to be validly issued.<sup>3</sup>

Neither can we discern from the various rules addressing classification of violations a requirement to include such classification on a citation. Labor Code section 6319(g) recognizes violations must be characterized in order to assess a penalty.

Based on the evidence, the division may propose appropriate modifications concerning the characterization of violations and corresponding modifications to civil penalties as a result thereof.

(*Id.*) This section allows for modifications, which we interpret to include amendments, concerning the characterization of a violation and corresponding penalties. Consistent herewith, the Board has reasoned that an amendment to change the classification of a violation does not violate an employer's rights, and is thus allowed. (*E & G Contractors, Inc*, Cal/OSHA App. 81-825, Decision After Reconsideration (Mar. 27, 1997); *Gaewhiler Construction, Inc.*, Cal/OSHA App. 78-1985, Decision After Reconsideration (Jan. 7, 1985): "It is well settled

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<sup>3</sup> Previously, the Board stated in dicta that classification is required on the citation in order to satisfy the Labor Code requirement that "each citation . . . shall describe with particularity the nature of the violation." (*Hudson Plastering Co., Inc*, Cal/OSHA App. 85-1476, Decision After Reconsideration (Nov. 19, 1987). The description of the classification at issue in *Hudson* was confusing and not supported by the evidence, but the error did not require voiding the citation entirely. Indeed, such would have been the required result were dicta in *Hudson* a correct statement of the law. We note the sentence in *Hudson Plastering* does not carry a citation to any rule or Decision After Reconsideration.

that administrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws.” Citing, *inter alia*, *Novo-Rados Constructors*, Cal/OSHA App. 78-135, Decision After Reconsideration (Apr. 28, 1983); *Guy F. Atkinson Co.*, Cal/OSHA App. 75-929, Decision After Reconsideration (Jan. 27, 1976).) We conclude the terms characterization and classification are synonymous.

The Division’s authority to calculate and assess penalties is granted in Labor Code section 6319, and regulations implementing that directive have been enacted.<sup>4</sup>

Section 334 states:

For purposes of penalty assessments, violations of occupational safety and health standards, violations of California Health and Safety Code Sections 2950 and 2951, orders, special orders, and regulations are classified<sup>5</sup> as follows: (a) Regulatory Violation . . . . (b) General violation . . . .(c) Serious Violation. . . . (d) Repeat Violation . . . . (e) Willful violation.<sup>6</sup>

(*Id.*)<sup>7</sup> The division must first classify the violation in order to assess a penalty. (*ARB Inc*, Cal/OSHA App. 92-1001, Decision After Reconsideration (Sep. 8, 1997).) But these rules do not require the classification be placed on the citation.

Rather, section 333 allows for the separate notification of the assessed penalty, apart from the citation.

Where a civil penalty is indicated, the Division shall, after or concurrently with the issuance of a citation, and within a reasonable time after the date the violation occurred, notify the employer by certified mail of the civil penalty proposed by the

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<sup>4</sup> Section (c) of 6319 enables the Division to promulgate the penalty assessment regulations. “The director shall promulgate regulations covering the assessment of civil penalties under this chapter which give due consideration to the appropriateness of the penalty with respect to the following factors: (employer size, gravity of violation, good faith of employer, history).”

<sup>5</sup> This section contains the only reference to the term “classification.”

<sup>6</sup> Willful is defined. “Willful - is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.”

<sup>7</sup> If a violation pertains to permits, posting requirements, recordkeeping, etc, and does not fall within the definition of General or Serious, it may be properly classified as Regulatory for penalty assessment purposes. (§ 334.) If the violation has a relationship to employee health and safety, but does not meet the definition of a Serious, then it is properly classified as General. (§ 334.)

Division respecting the item(s) set forth as violation(s) in the citation.

(*Id.*) And, a civil penalty may only be issued where “indicated.” This language does not require a penalty be assessed for every citation. Thus, failure to classify and assess a penalty cannot invalidate a citation.

Various provisions of the Labor Code use the classifications defined in the regulation, and give additional restrictions or requirements concerning penalty amounts depending on the classification. For example,

(d) Notwithstanding subdivision (c), if serious injury, illness, exposure, or death is caused by any serious, willful or repeated violation, or by any failure to correct a serious violation within the time permitted for correction, the penalty shall not be reduced for any reason other than size of the business of the employer being charged.

(Lab. Code § 6917(d).) The Labor Code also specifies the maximum penalty for a non-serious violation (Labor Code § 6427), a serious violation (Labor Code § 6428), a willful or repeat violation (Labor Code § 6429) and for a failure to abate a violation (Labor Code § 6430). The Labor Code sets forth additional evidentiary requirements the Division must meet in order to sustain a serious classification for a violation. (Labor Code § 6432.) That section defines “serious violation” in a manner consistent with the definition promulgated in the regulation. (§ 334(c)(1).) None of these sections impose changes to, or alter the form of, the citation required by section 6317. Rather, if the Division elects to classify a violation as Serious in its Notice of Penalty, it must prove facts consistent with the section 6432 definition.

Here, the proposed penalty was stated as \$5000.00 on the face of the citation, which also identified the violation as “Willful”. Although neither is required by 6317, we recognize the Division’s practice of including this information on the citation. The practice does not change the language of section 6317, which we must follow. So long as the information on the timely, written citation states with particularity the nature of the violation, and the rule or regulation allegedly violated, the citation is valid. We decline to define “with particularity” as requiring the citation to include all components of a valid Notice of Penalty in addition to the items required for a citation. The regulations and the statutory scheme make clear these are two different requirements.<sup>8</sup> And, the citation operates as the administrative accusation,

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<sup>8</sup> The requirement that administrative citations describe “with particularity” the nature of the violation, including the regulation alleged to be violated, is found throughout California law. (See e.g. Bus. & Prof. Code 3767 (also requires abatement order and requires assessment of civil penalty in statute); 7099.7564, 7587.7 (no requirements for penalty assessment, it is discretionary: “may”). Thus, if the Legislature intended to require the citation also contain the penalty (which requires classification) it would have

which has long been considered in the nature of a civil pleading, requiring the details give notice of the general set of facts to which the Employer must answer. “The Board has recognized that administrative proceedings are not bound by strict civil rules of pleading and the courts will not require the imposition of rules of pleading and proof more stringent than those followed in civil actions. (*John T. Malloy, Inc.*, Cal/OSHA App. 81-790, Decision After Reconsideration (Mar. 31, 1983); citing the Supreme Court in *Stearns v. Fair Employment Practices Commission* (1971) 6 Cal.3d 205, 214-214.)” (*Teichert Aggregates*, Cal/OSHA App. 04-2982, Decision After Reconsideration (Feb. 5, 2007).) Thus, we decline to recognize or impose additional formalities on the issuance of the citation that do not appear in the statute.

The citation, as issued, met the Labor Code requirements for a validly issued citation. The Notice of Penalty, issued concurrently therewith, put employer on notice of the Division’s intent to prove a Willful General violation. Of course, when the Division seeks to impose a penalty for an alleged violation, it must inform the employer in writing of the violation’s classification that would support the penalty. The Division satisfied that due process requirement in this case. (*Empire Pro-tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).) Due to the unique circumstance that the listed penalty was also the statutory minimum for a Regulatory Willful violation (no relationship to occupational safety and health of employees)<sup>9</sup>, the Division here need only show the elements of the violation (prohibited material in work area), and for the penalty assessment, the Employer’s management personnel had knowledge of the condition and did not undertake efforts to reasonably protect workers from becoming exposed to the hazard (i.e. willful).

### **DECISION AFTER RECONSIDERATION**

Thus, the rationale in the Decision for granting Employer’s appeal summarily is not supported by the Labor Code provisions that define the necessary components of a valid citation. We therefore remand the matter for further hearings to determine the existence of the violation, and the propriety of assessing the proposed penalty. The Employer placed in issue the

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included it in Labor Code 6317, as it did in the Business and Professions Code, supra. We decline to read a term in to a statute that the legislature could have included, but opted not to.

<sup>9</sup> The Willful classification is listed as a separate classification in section 334, but the range of penalty amounts further depends on the classification as either Regulatory, General or Serious.

“Willful violation- If a Regulatory, General or Serious violation is determined to be willful (as provided under § 334(e) of this article) the Proposed penalty is adjusted upward as follows:

Regulatory, General and Serious- the proposed penalty is multiplied by five. However, the penalty for any willful violation shall not be less than \$5000.00 and shall not exceed \$70000.00.” (§ 336(h).) Thus, a violation can be intentional and knowing in terms of the employer’s conduct, but have a variety of impacts on the exposed employee(s). These impacts determine whether the proper classification is Regulatory, General or Serious in section 334, and thereafter, the correct amount of penalty.

classification of the violation when it appealed the penalty assessment in its appeal form. In the absence of further amendments, the issues on remand will include the existence of the violation and the classification of the violation for purposes of establishing the allowable penalty according to Division regulations. Since the ALJ denied Employer's motion to amend its appeal to include the Independent Employee Action Defense based only on the timing of such motion, and not on its merits, the Employer is not precluded from reasserting this motion in accordance with Board regulations in the course of the further proceedings.

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

ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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