

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

In the Matter of the Appeal of:

DUININCK BROS., INC.  
P.O. Box 208  
Prinsburg, MN 56281

Employer

Docket No(s). 06-R4D3-2870 and 2871

**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 taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) under submission, and having taken the matter under reconsideration on its own motion, renders the following decision after reconsideration.

**JURISDICTION**

On July 19, 2006, the Division of Occupational Safety and Health (Division) issued two citations to Duininck Bros., Inc, (Employer) after investigating an accident which occurred on February 16, 2006. Employer timely appealed and the matter was heard by an Administrative Law Judge (ALJ) for the Board, who issued a Decision on August 26, 2009. The Decision granted Employer's appeal of Citation 1 after denying the Division's motion to amend the citation to correct a clerical error. The Decision also upheld Citation 2, Item 1, but concluded the Division failed to establish the accident related portion of the classification, and reduced the penalty accordingly. The Division petitioned for reconsideration as to Citation 1. The Board, on its own motion, took reconsideration of the findings and conclusions relevant to citation 2. Both matters are considered herein.

Citation 1, Item 1, alleged a violation of Title 8, California Code of Regulations, section 3202<sup>1</sup> [failure of Employer to provide training and instruction to new employees required to unload 400 lb. pipes]. This citation contained a reference to the wrong safety order, section 3202(a)(7), which does not exist. However, the description and quoted language is identical to section

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<sup>1</sup> All references are to the California Code of Regulations, Title 8, unless otherwise indicated.

3203(a)(7). The Division sought to amend the typographical error in the citation at the hearing, but the request was denied by the ALJ. This denial is the subject of the Division's Petition for Reconsideration.

Citation 2, Item 1, alleged a violation of section 3704 [failure to secure loads from accidental displacement]. This violation was classified as serious, accident related. The Board raised three issues in its Order of Reconsideration regarding Citation 2. Specifically, the issues were: "1) Was the violation of 3704 properly upheld? 2) Was the serious classification properly upheld? 3) Should the 'accident related' characterization have been upheld?"

The Division and Employer filed Answers. After review of the entire record and arguments in the case, we affirm in part the Decision of the ALJ regarding Citation 2, Item 1, and remand Citation 1, Item 1 for further proceedings consistent herewith. The docket numbers are set forth separately.

### **EVIDENCE**

The evidence consists of witness statements, photographs, and the testimony of the Division inspector, Beverly Brentwood. On February 16, 2006, Employer's employees were assigned to unload a truck delivering over 80 pipes, each of which weighed approximately 400 to 450 pounds. The pipes were bundled and stacked, and were each the length of the large trailer bed. The employees were attempting to complete this task by using a forklift to unload the bundles.

Employer's supervisor arrived at the work location and directed the employees to discontinue the use of the forklift as it was too small to accomplish the unloading task safely. Instead, the supervisor directed an employee to climb on the load and cut the bundle straps of the top pipe bundle. After the last strap was so cut, the supervisor and the employee lifted the pipe at the ends and shoved it off the load to the ground. Other employees observed from a safe distance.

During this maneuver, the employee lost his balance and fell face down from the truck bed on to the ground and in to the path of the falling pipe. The falling pipe struck him on the head, causing fatal injuries.

The Division issued two citations. The citation alleging a violation of training requirements contained a typographical error in one digit of the referenced Safety Order.

**Citation 1**

**Docket No. 06-2170**

**DECISION**

At the beginning of the hearing, the Division made a motion to amend Citation 1, Item 1 to correct a clerical error in the Safety Order number included in the citation.

The Division cited Employer thusly:

“Citation 1 Item 1 Type of Violation **Serious**

3202(a) effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

(7) Provide training and instruction:

(A) When the program is first established;

EXCEPTION: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in section 3202.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

EMPLOYER DID NOT PROVIDE TRAINING AND INSTRUCTION TO NEW EMPLOYEES REQUIRED TO UNLOAD 400LB. PIPES ON FEBRUARY 16, 2006.

Date By Which Violation Must be Abated: 09/05/2006

Proposed Penalty: \$8100.00”

Except for the averment written in all capital letters, this is the text, verbatim, of portions of section 3203. The Division produced uncontradicted evidence that “section 3202”, rather than “section 3203”, was a typographical error that evaded discovery until shortly before the hearing. The at-hearing motion was denied because it was brought later than 20 days prior to the hearing, and no showing of good cause for the delay was made. Employer did not show that it was prejudiced by the proffered amendment.

Citations and appeals may be amended in a variety of ways under the Board’s Rules of Practice and Procedure authorized by Labor Code section 6603. Recently, the Board reviewed the history and authority for sections 371, 371.2, and 386, which allow for amendments. (*G.T. Alderman*, Cal/OSHA App. 05-3513, Decision After Reconsideration (Nov. 22, 2011).)

It is clear that amendments to Cal/OSHA citations are allowed in the same manner as provided in the Government Code for all administrative accusations. Government Code sections 11507 and 11516, with which our rules must be consistent, allow amendments that fall within the general set of facts contained in the original citation and do not cause prejudice to the non-moving party to be made at any time. (Labor Code § 6603; Govt. Code 11342.2.) Government Code section 11507 states,

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Board Rule 371 states amendment motions must be brought prior to 20 days before the hearing, but the rule does not apply if the ALJ orders otherwise. That is, amendment motions brought within the 20 days preceding the hearing are permitted. Consistent with the enabling legislation, so long as the amendment relates back to the general set of facts as originally pled, and does not result in prejudice to the non-moving party, amendments at the hearing (or within the 20 day period preceding the hearing) may be allowed without the moving party establishing good cause for failure to bring such motion earlier. (*G.T. Alderman*, *supra*.)

Board precedent similarly does not embrace granting an appeal due to errors in the citation that do not result in prejudice to an employer. (*John T. Malloy, Inc.*, Cal/OSHA App. 81-790, Decision After Reconsideration (Mar. 31,

1983), citing *Stearns v. Fair Employment Practices Comm'n* (1971) 6 Cal.3d 205, 214; *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995); *Teichert Aggregates*, Cal/OSHA App. 04-9282, Decision After reconsideration (Feb. 5, 2007).<sup>2</sup> Thus, the ALJ needed to exercise her discretion to determine if the amendment motion should be granted. She erroneously concluded that she was prohibited from considering the at-hearing motion.

We conclude this citation was issued in compliance with Labor Code section 6317, which states “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.” Reciting the full content of the standard allegedly violated is sufficient to provide a “reference to the . . . standard . . . alleged to have been violated.” The citation apprised Employer that section 3203 was actually the section alleged to have been violated. The entire text of section 3203(a)(7) was included on the face of the citation. It would be unreasonable to conclude the typographical error in the reference section, to 3202, was sufficient to erase the remaining contents of the citation which recite verbatim the rule with which Employer was to comply, and the factual basis for the alleged violation.

Here, the section number included is the section number immediately preceding the standard allegedly violated, which states the orders which follow apply to all places of employment unless specifically stated otherwise. Since section 3202, the section number listed, is not in any way inconsistent with the standard recited verbatim on the face of the citation, i.e. section 3203, there is no basis to infer Employer was prejudiced by the typographical error.<sup>3</sup>

Thus, there is no blanket requirement that all motions to amend, for any reason, be denied if brought within the 20 days preceding the hearing and for which good cause regarding the timing is not established. (See *G.T. Alderman*,

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<sup>2</sup> Our reading of Rule 371 does not eliminate the need to show good cause for amendment motions that are brought within the 20 days preceding the hearing, such as when prejudice can be shown by the opponent. Before the 20 day rule was adopted in 1992, amendments that related back to the original citation had to be granted, and in the event of prejudice, a continuance was ordered to cure such prejudice. The rule changes in 1992 specifically sought to control and preserve the board’s resources by limiting the need for continuances caused by a party delaying reviewing its file, and then wishing to materially change its pleading (citation or appeal) such that prejudice resulted to the opponent. (See Occupational Safety and Health Appeals Board Rulemaking file certified October 29, 1992, section F, Final Statement of Reasons and Updated Informative Digest, p. 20.)

<sup>3</sup> The ALJ concluded as much at the hearing, but ruled otherwise, quoting from *California Erectors Bay Area*, Cal/OSHA App. 93-503, Decision After Reconsideration (Jul. 31, 1998) in the Decision. The quote from *California Erector Bay Area* does not prohibit a non-substantive amendment as was requested here. Rather, *California Erector Bay Area* cautions against allowing amendments within the 20 day pre-hearing period that would prejudice the opponent without the movant establishing good cause for the timing of the motion. *California Erectors Bay Area* is thus distinguishable from this case.

*supra.*) The ALJ must first determine whether it is appropriate to exercise her discretion to consider the amendment motion.

The language of Rule 371(c) allows the ALJ to consider motions to amend brought at any time. “Unless otherwise ordered, the following dates shall apply to prehearing motions and requests: (1) A motion or request shall be served and filed no later than 20 days before the hearing date.” Rule 371(d) concerns the *right* to make motions or requests closer to the hearing date than delineated in subdivision(c)(1). “A request to file a motion, . . . later than the times specified in (c) shall be granted if accompanied by a declaration showing good cause for the late filing.” (Rule 371(d).) Thus, an ALJ must consider a late filed motion if good cause for the lateness is shown. This rule does not *prohibit* an ALJ from considering a late filed motion under any other circumstance. Of course, if the amendment would not relate back to the original citation, it would be improper if made beyond six months of the date of the violation, regardless of when, relative to the hearing date, the motion is brought. (Labor Code § 6317, para. 6; *E & G Contractors*, *supra*; *Western Roofing*, Cal/OSHA App. 75-029, Decision After Reconsideration (Apr. 23, 1981).) If the amendment does relate back, it may be considered. (Labor Code § 6603, Govt. Code § 11507.)

For these reasons, we grant the Division’s motion to amend Citation 1, Item 1, to correct a clerical error. (Labor Code sections 6621 and 6623.) The ALJ concluded at the hearing that Employer did not show any prejudice resulted from the amendment. However, she stated her belief that she was required to deny the motion because Rule 371 required her to deny all motions brought at the hearing without good cause for not bringing such motion earlier. This is an incorrect statement of law. Rather, in this case of typographical error and lack of prejudice to Employer, the motion may be granted, and we do so herein. We remand docket number 06-2870 for further proceedings to determine the existence of the violation alleged in amended Citation 1, Item 1.

## **Citation 2**

### **DOCKET No. 06-2871**

#### **Decision**

Section 3704 states:

“All loads shall be secured against dangerous displacement either by proper piling or other securing means.”

The Decision concludes a violation occurred, that the evidence was sufficient to establish the serious classification, but that the accident related

portion of the penalty was not established, thus allowing for penalty reduction.<sup>4</sup>

The evidence contained statements by the supervisor, Travis Quisberg, to the Division inspector, Beverly Brentwood, that he instructed the deceased employee to cut the straps around the bundle of lengthy, 400 pound pipes, and that after the straps were cut, he lifted one end of the pipe, and the deceased employee lifted the other end of the pipe. Together, they shoved the pipe from the top of the load on the truck onto the ground. In the course of that maneuver, the pipe moved dangerously, causing the deceased employee to fall in to the path of the falling pipe, which struck and killed him. Witness Escobar told Division inspectors that the pipe hit decedent on the back after decedent cut the straps, causing him to lose his balance and fall in to the path of the falling pipe.

This evidence is sufficient to establish the elements of the safety order were violated. (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477 Decision After Reconsideration (Jul. 7, 2011) [violation of section 3704 shown when loads not maintained so as to prevent movement at any time movement may occur].) The requirement is preventative in nature and applies regardless of whether an employer had an indication that the load could become unstable or displaced. (*Traylor Bros.*, Cal/OSHA App. 98-2345, Decision After Reconsideration (Jun. 12, 2002).) The load of pipes was not secured after the straps were cut. Dangerous displacement resulted, and would not have had the straps remained secured. According to the supervisor's statements, when he arrived at the location of his crew, they were attempting to unload the truck with a forklift which was too small for the job. He instructed them to discontinue use of the forklift, and to attempt to unload by hand rather than await the arrival of a larger forklift. The violation is thus established.

Employer argues the statements made by its supervisor, Quisberg, to the inspector, on the day of the accident at the accident location, cannot be relied on by the Board in rendering a Decision. Generally, the rules of evidence do not apply in these or any administrative hearings. Labor Code section 6612 states,

No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, or finding made and filed as specified in this division. No order, decision, or finding shall be invalidated because of the admission into the record, and use as proof of any fact in dispute of any evidence not admissible

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<sup>4</sup> Employer, in its Answer to the Order of Reconsideration, asserted the evidence of the violation was only shown by inadmissible hearsay, that no employee was exposed to the violation, that the serious classification evidence was insufficient, and that the ALJs analysis of the "accident related" portion of the penalty assessment was correct. We address these claims as they arise.

under the common law or statutory rules of evidence and procedure.

Board rules accordingly allow the admission of evidence that would not be allowed in civil proceedings. “The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil action.” (§ 376.2.) Hearsay is admissible, with the only limitation being that, if timely objection is made, hearsay shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (§376.2.) If a hearsay statement is the *only* evidence of a fact that must be shown in order to establish a violation or a defense, it must fall within a recognized exception.

Admissions by a party, or its representative, are not made inadmissible by the hearsay rule. (Evid. Code section 1222.) The evidence that establishes Quisberg was a supervisor consists of far more than merely his statement to that effect. Thus, the statements made by supervisor Quisberg may form the evidentiary basis for the elements of the violation. It is not the *only* proof of the fact of his supervisory status. Since it is corroborated, it may be relied on to prove his supervisory status.

At least four other items of evidence corroborate the supervisory status of Quisberg. First, his title as supervisor appears on the signed witness statement taken by Brentwood during the course of her investigation on the day of the accident. Second, the signed statement of co-employee Escobar taken by Division intern Daniel Pulido states “Travis came and stopped them from unloading” which corroborates that Travis Quisberg had authority for the safety of the crew, and was thus a supervisor. Also, non-hearsay evidence corroborates Quisberg’s status as the supervisor. Quisberg was present at the scene, and retained by the local police at the scene to facilitate the Division’s inspection. Last, when the Division inspector requested to speak to Employer’s supervisor, Quisberg presented himself for that purpose in front of the sheriffs in attendance, and his crew of Employer’s employees.

The Division may rely on the behavior of Employer’s employees during the investigation to establish the identity of the on-site supervisor. (*O’Mary v. Mitsubishi Electronics Am., Inc* (1997) 59 Cal. App. 4<sup>th</sup> 563 [circumstances surrounding the representative’s statements provided foundation for inferring the authorization of the speaker to speak on behalf of principal against whom statement was admitted].) Since Brentwood investigated the accident on the day it happened, the sheriff retained Employer’s employees at the site to facilitate this investigation, and the Division is obligated by statute to identify any supervisors present at the time of the investigation, Quisberg’s statement

to Brentwood, recorded by her in the course of her official duties, is not the only evidence of his supervisory status. (Labor Code section 6314(c)<sup>5</sup>; Evidence Code section 1280<sup>6</sup>, Evidence Code 664, *People v. Martinez*, (2000) 22 Cal.4<sup>th</sup> 106.) In this context, section 376.2 does not allow Employer to avoid the legal effect of the statements made by its representative.<sup>7</sup>

Furthermore, the principal danger in admitting and relying on hearsay is the lost opportunity of the party against whom it is admitted to cross examine the out of court speaker. In the case of admissions, such lost opportunity to cross examine oneself is irrelevant. (Jefferson, *California Evidence Benchbook*, 4<sup>th</sup>, §3.13 (2009).) Here, as well, such danger does not exist. The out of court speaker, or actor, is Employer's employee, Quisberg. Employer is not prohibited from calling its own employee, or otherwise providing evidence that the Division's inspector erroneously identified Quisberg as the on-site supervisor entitled to accompany her on her investigation. Since she has to identify the supervisor, we may presume she did it correctly, unless convincing evidence to the contrary is provided. (Labor Code section 6314; Evidence Code section 664; *Baker v. Gourley* (2000) 81 Cal App. 4<sup>th</sup> 1167, 1172-73.) None was shown, so the presumption that Quisberg was correctly identified as the supervisor suffices.

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<sup>5</sup>These recorded statement documents are official records of the Division created in the course of its investigation pursuant to the Division's legal obligation to accurately record the information obtained. "The chief and his or her authorized representative may issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, and physical materials, administer oaths, take verification or proof of written material, and take depositions and affidavits for the purpose of carrying out the duties of the Division." (Labor Code section 6314) Subsection (d) requires the Division to give the supervisor the opportunity to accompany the inspector during the inspection. To fulfill this requirement, Division inspectors must request the supervisor identify himself. (Labor Code section 6314.). We may presume this duty was regularly performed. (Evidence Code section 664.) If the investigator mis-identified Quisberg as the supervisor, Employer must provide evidence to overcome the presumption that she properly identified him as the supervisor entitled to accompany her on her inspection. Employer neither presented any evidence nor cross-examined the Division investigator. Thus, the presumption that she correctly identified the supervisor remains.

<sup>6</sup> Evidence Code section 1280 states: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event, if (a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness." A trial court has broad discretion in determining whether a party has established these foundational requirements. (*People v. Beeler* (1995) 9 Cal.4<sup>th</sup> 953, 978). The Division investigators have a duty to investigate by taking written statements, the writing was made within hours of the witness observing the event, and the sources of the information are Employers own employees who knew they were giving important statements to OSHA investigators, and thus aware of the need for truth and accuracy. There is no indication that Escobar's statement that Quisberg stopped the forklift work was not truthful. The inference reasonably drawn from Quisberg's act of stopping the workers was that he was the supervisor.

<sup>7</sup> The kind of problematic, stand-alone statement Employer alludes to might arise if the Division were to attempt to admit a telephone statement of one asserting he was a supervisor, without corroboration as to the identity of the speaker, for both the foundational fact of supervisory status, as well as the content of the statements offered against an employer. Here, the presence of Quisberg at the scene, his behavior, statements, and the behavior and statements of the sheriff and co-employees were all consistent with Quisberg's status as the person responsible for safety from Employer at the site. The preclusion against basing a finding on only one hearsay statement thus does not apply here.

And, the status of the supervisor is a preliminary or foundational fact. (Jefferson, *Evidence Benchbook*, section 3.32 et seq; *Petricka v. Dept. of Motor Vehicles* (2001) 89 Cal. App. 4<sup>th</sup> 1341, 1350 [“The foundational evidentiary fact that the (official duty was complied with in accordance to governing law) is not a substantive component of the (administrative enforcement agency’s) prima facie case. As such, that fact can be established by the Evidence Code presumption and is subject to rebuttal.”] Here, the Division inspector’s duty to identify the supervisor resulted in Quisberg being identified as the supervisor. Hearsay statements in fellow employee Escobar’s statement taken on the day of the accident corroborate the foundational fact of Quisberg’s supervisory status, which arises by presumption. Thus, both corroborating evidence and a legal presumption establish Quisberg was the supervisor. His statements are admissions of Employer that would be admissible in civil proceedings, and were correctly relied on by the ALJ in the Decision to conclude the Division established a violation of section 3704.

Next, the evidence in support of the serious classification satisfied the Division’s burden of proof. (*Abatti Farms Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985) [medical expert testimony that strain on spine from bent and stooped work position required by use of short handled lettuce hoe increases the likelihood of degenerative disc injury was sufficient to uphold serious classification that use of hoe more likely than not could cause serious injury]; *Crescent Metal Products*, Cal/OSHA App. 94-629, Decision After Reconsideration (Dec. 6, 1994) [inspector’s testimony that opening in machine was large enough for human finger to enter and amputation could result was sufficient to show substantial probability that serious harm could result].) The Division’s witness testified that she had investigated approximately a dozen cases where someone was struck by a 400 pound object, and 100 percent of those cases involved a serious injury. Thus, there is evidence to support the ALJ’s conclusion that, more likely than not, if an accident occurs as a result of Employer failing to prevent dangerous displacement of a 400 pound load, the resulting injury would be serious.

Last, the Decision concludes the accident related portion of the classification was not established. The Division establishes that a violation is accident related by showing the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4270, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Nov. 1, 2002); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).) But for the removal of the straps from the load, the load would have remained secured against dangerous displacement, and not have fallen to the ground and struck decedent. Thus, the violation, properly classified as

serious, caused a serious injury. The accident related component is established.<sup>8</sup>

We thus affirm the violation and penalty alleged in Citation 2, Item 1, and imposed a penalty of \$18,000.00. (See section 336(c)(3).)

ART R. CARTER, Chairman  
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: APRIL 13, 2012

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<sup>8</sup> Employer articulated no reason why the accident related component of the penalty was not established. Instead it adopted the ALJs reasoning for concluding the accident related component had not been shown. That reasoning was based on *Paradiso Mechanical*, Cal/OSHA App. 06-5033, Denial of Petition for Reconsideration (Jul. 22, 2009), and an understanding of that case as holding the safety order only protected against accidental displacement. Thus, reasons the Decision, since this pipe was intentionally shoved off the load, the hazard addressed by the safety order was not the one that caused the accident. *Paradiso Mechanical* does not so hold, and we decline to add the word “accidental” to the safety order. In any event, so long as a violation of the safety order is a cause of a serious injury, no penalty adjustments other than for size are allowed. (§336(c)(3).)