

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

In the Matter of the Appeal of:

HYPOWER, INC. dba
HYPOWER ELECTRIC SERVICES, INC.
5913 NW 31st Avenue
Ft. Lauderdale, FL 33309

Employer

Docket No. 12-R3D3-1498

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Hypower, Inc. doing business as (dba) Hypower Electric Services, Inc. (Employer).

JURISDICTION

Commencing on December 22, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer at which an injury accident took place.

On April 27, 2012, the Division issued a citation to Employer alleging a Serious violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 1509(a) [ineffective injury and illness injury prevention program – failure to train employees].¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On June 20, 2013, the ALJ issued a Decision (Decision) which upheld the alleged violation but reduced its classification to General and reduced the civil penalty accordingly.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Was the ALJ correct in finding Employer had violated section 1509(a)?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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's petition asserts the ALJ acted in excess of her powers in issuing the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The accident giving rise to the citation occurred when one of Employer's employees was injured while attempting to show a second employee how to operate a "Skid Steer," a motorized piece of equipment similar to a fork lift. The injury was not serious, as defined in Labor Code section 6302(h).

Mr. Hohn (Hohn), the injured employee, was hired as a laborer, and after a month or two of working in that capacity at the construction site where the accident occurred was assigned the task of operating the Skid Steer. Although Hohn had prior experience and various certifications related to operating fork lifts, he was not trained in operating the Skid Steer. He testified that he figured out how to operate it himself. Subsequently, Hohn was told to let a second employee operate the Skid Steer, but when that second employee was

unable to do so, Hohn was told to show the second man how to do so. In the process of giving that instruction, Hohn was injured when the other inadvertently activated the Skid Steer.

The citation alleged a violation of section 1509(a), a “construction safety order” which incorporates section 3203, a “general industry safety order” requiring employers to establish and maintain an injury and illness prevention program or “IIPP,” by reference. The citation cross-referenced section 3202(a)(7), included the text of that provision, including all of its subparagraphs, (A) through (F), and gave a summary of the circumstances giving rise to the violation. That summary included the following: “On and before 28 October 2011, the employer did not implement their IIPP in that the employer did not provide training to employees who were assigned the task of operating skid-steer loaders at the site.”

The Decision found that Employer had not trained Hohn as required but that the Division had not met its burden of proof as to the “Serious” classification of the violation. The ALJ reduced the classification of the violation to “General” and recalculated the penalty.²

Employer’s petition contends the citation did not adequately allege the violation, and seeks reversal of the Decision on that basis. The petition also argues that Hohn was trained albeit not by Employer. Employer does not challenge the penalty.

1. Sufficiency of Allegations.

Section 1509 requires employers engaged in construction activities to create and enforce an IIPP which complies with section 3203, the general industry IIPP provision. The citation alleges Employer violated section 1509(a) and cross-referenced section 3203(a)(7), which specifies that employers shall provide “training and instruction” in various circumstances spelled out in six subparagraphs, (A) through (F).

Employer argues that by failing to specify which subparagraph was alleged to have been violated the Division violated Employer’s due process right to fair notice.

This argument was not raised in Employer’s post-hearing brief. Until it filed its petition for reconsideration Employer appears to have fully understood the nature of the allegations against it, and to have defended against them successfully to a significant degree.

² We discovered an arithmetic error in the penalty calculation, addressed *infra*.

The citation included the text of section 3203(a)(7)(A) through (F), which begins as follows: “(7) Provide training and instruction:[.]” therefore putting Employer on notice that it was alleged to have violated the training requirements of the safety order. Further, the “violation” portion of the citation states factual allegations which are more than sufficient to notify Employer that Hohn’s training to operate the Skid Steer was lacking or inadequate. Due process requires general “notice” pleading. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002).) Administrative proceedings are not bound by strict civil rule of pleading. (*John T. Malloy, Inc.*, Cal/OSHA App. 81-790, Decision After Reconsideration (Mar. 31, 1983); see *Stearns v. Fair Employment Practices Commission* (1971) 6 Cal.3d 205, 213.) Further, read in context with the description of the accident, it is apparent that the citation alleges that two employees were told to operate the Skid Steer without having been trained to do so, which would fall within the scope of subsection (C) [new job assignments for which training has not been received].

As long as 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. (*Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985), and *Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010).)

Additionally, an employer must show prejudice in order to sustain an allegation that the description in the citation was not sufficiently particular. (*DSS Engineering Contractors, Inc.*, Cal/OSHA App. 86-1023, Decision After Reconsideration (Jun. 3, 2002).) In *Structural Shotcrete System*, supra, the Appeals Board determined that employer had not offered any evidence on which to conclude it was unaware of the nature of the conduct that was the subject of the citation, or that it suffered any prejudice in preparing a defense. Employers who do not show how they are prejudiced by the inclusion of two subdivisions within the same regulation are similarly without a remedy. (*G. T. Alderman, Inc.*, Cal/OSHA App. 05-3513, Decision After Reconsideration (Nov. 22, 2011).)

2. Training.

As to the training of the two employees, the Decision found that although the evidence was insufficient to show Employer had not trained the employee Hohn was attempting to teach to operate the Skid Steer, the evidence was that Employer had not trained Hohn himself. Employer argues that Hohn was experienced, and that Employer did not have to be the person which trained Hohn, as long as he was trained. There are three flaws to this argument.

First, section 3203(a)(7), as incorporated into section 1509, requires that employers “provide training and instruction[.]” The plain meaning of the language is that employers must train or cause their employees to be trained.

Second, Hohn testified that he was not trained on how to operate the Skid Steer, but was able to figure it out for himself based on past experience with similar equipment.

Third, Hohn had been hired as a laborer and later reassigned to operate the Skid Steer, and was not trained for that new assignment as required by section 3202(a)(7)(C). And, at the time of the accident, Hohn had been given an *additional* new assignment, namely to train the other worker on how to operate the Skid Steer. There is no evidence in the record nor any contention by Employer that Hohn had been trained as a trainer, or had any instruction on how to train others to operate a Skid Steer (or any other equipment).

3. Decision’s Penalty Calculation.

After finding that the Division did not meet its burden of proving the alleged violation satisfied the “Serious” classification, the ALJ recalculated the penalty for a “General” violation. (Decision, p. 8.) During one step in that process, the ALJ reduces the partially-adjusted penalty of \$900 by an additional 10% reduction, but showed the result of that calculation as “\$890” instead of the correct amount, \$810. Applying the additional reduction of 40% to \$810 yields \$485; a final abatement credit of 50% results in a final penalty of \$240.³

Although neither Employer nor Division has petitioned or mentioned the error in penalty calculation, we have jurisdiction to correct the error, and do so here. (Labor Code § 6620.) Moreover, the error was in the nature of a clerical error, which can be corrected despite lapse of time. (*Kaufman v. Shain* (1896) 111 Cal. 16 [amendment may be made at any time]; *Bastajian v. Brown* (1941) 19 Cal.2d 209, 214; *Russell v. Superior Court* (1967) 252 Cal.App.2d 1; 7 Witkin, California Procedure, 5th Ed., Judgment, §§ 67-70.) Board precedent has recognized and applied that rule of law. (*The Village at Child Help West*, Cal/OSHA App. 06-4267, Denial of Petition for Reconsideration (Nov. 10, 2008).)

³ The product of the two indicates calculations (first, 0.6×810 ; and second, 0.5×485) are each shown after rounding to the next lower even \$5.00 amount. (See § 336(j).) The before-rounding products are 486 and 243, respectively.

DECISION

For the reasons stated above, the petition for reconsideration is denied, and the Decision is affirmed except that the civil penalty assessed against is amended to \$240.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: September 11, 2013