

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

In the Matter of the Appeal of:

ROEBBELEN CONTRACTING, INC.
1241 Hawks Flight Court
El Dorado Hills, CA 95762

Employer

Docket No. 12-R2D2-3248

ERRATUM

On April 13, 2015, the Occupational Safety and Health Appeals Board (Board) issued a Decision After Reconsideration with an attached Summary Table. By this Erratum the Summary Table is corrected as follows:

The following language printed at the bottom of the Summary Table should be removed:

The penalty set forth on this table is payable in thirty (30) installments. The first payment of \$8,747 is due May 1, 2015, and then \$8,747 is due on the 1st of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.

This Erratum to the Decision After Reconsideration relates back to the issuance date of April 13, 2015.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 22, 2015

SUMMARY TABLE DECISION AFTER RECONSIDERATION ERRATUM

In the Matter of the Appeal of:

ROEBBELEN CONSTRUCTION, INC.
Docket No(s). 2012-R2D2-3248

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 314330549

Site: 1600 California Drive, Vacaville, CA 95687

Date of Inspection: 04-18-2012 ~ 10/11/2012

Date of Citation: 10/12/2012

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
12-R2D2-3248	1	1	341(d)(4)	Reg	Failure to have project permit for construction of new building made of concrete and steel over 40' 6". Board affirmed the regulatory violation alleged in the citation, while amending the penalty to \$1,250 proposed by DOSH.	x		\$1,250	\$6,250	\$1,250
Sub-Total								\$1,250	\$6,250	\$1,250

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$1,250

NOTE: Payment of final penalty amount should be made to:
Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

POS: 4/22/2015

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

In the Matter of the Appeal of:

ROEBBELEN CONTRACTING, INC.
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Employer

Docket No. 12-R2D2-3248

**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 Roebbelen Contracting, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 18, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection at a construction site in Vacaville, California, maintained by Employer. On October 12, 2012 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

Citation 1 alleged a Regulatory violation of section 341(d)(4) [Failure to secure project permit].

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 July 30, 2013, affirming the violation. The Decision amended the classification of the citation from Regulatory to Willful Regulatory. The penalty was raised from \$1250 to \$6250.

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

Employer timely filed a petition for reconsideration of the ALJ's decision.² The Division did not file an answer.

ISSUE

Was the citation properly amended from regulatory to willful regulatory?

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 facts in this case are simple, and undisputed by the parties, who stipulated at hearing to the Employer's failure to have in place a permit for the Vacaville project. A stipulation by the parties will be followed by the Appeals Board where not contrary to law or policy, and may serve to remove factual and legal issues from the consideration of the Board. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration (Oct. 25, 2012), citing, *Kinder Morgan Energy Partners, L.P.*, Cal/OSHA App. 05-2013 Decision After Reconsideration (Oct. 28, 2011).) At the outset of hearing, the ALJ gave notice to the parties that she would consider amendment of the citation from regulatory to willful regulatory, and that the parties would have the opportunity to brief the classification issue. Neither the Employer nor the Division accepted the invitation to brief the classification issue. The Division

² The Construction Employers Association filed a Motion to Participate as Amicus Curiae in support of Employer, received by the Board on October 23, 2013. The Appeals Board may allow a party to file an amicus curiae within the time allowed for the filing of the answer or brief of the party whose position the amicus will support. (Section 393(e).) The Board declined to receive further briefing on this issue.

did not at any time during or after the hearing make a motion to amend the citation, despite the issue having been raised by the ALJ.

The ALJ's Decision amended the classification to regulatory willful, finding that Employer was aware of the need to apply for a permit, but failed to complete the procedure. A regulatory violation is defined under section 334(a) as:

a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

Willful is defined under section 334(e) of the regulations as:

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; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

Under the Board's rules of practice and procedure, as well as the Government Code, amendment of the classification of a citation is permitted, with notice.³ However, the Board finds the ALJ's request or invitation to reclassify the citation to be inconsistent with the procedure set out in the Board's own regulation. The Board declines to address the merits of the ALJ's request to the parties, as it was not initiated properly under the Board's rules of practice and procedure.⁴

Testimony at hearing established that the Employer was aware of the requirement to secure a permit before engaging in the construction work, and had indeed done so on numerous prior occasions. After making several

³ The Board must 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 are mandated to be consistent with the Government Code, and at sections 11507 and 11516 that Code allows for the amendment of accusations in administrative proceedings such as those of the Appeals Board. Amendment is permissible both during a proceeding and after submission for decision, if so ordered by the tribunal. Section 386 of the Board's rules of practice and procedure has been amended as of July 1, 2013. We reach this decision applying either the pre- or post-amendment rule.

⁴ For instance, the rules of practice and procedure describe methods for initiating a pre-hearing motion (Section 371), amendments (Section 371.2), conduct of the hearing (Section 376.1), as well as post-submission amendments (Section 386). These rules, and the ALJ's general authority to conduct the hearing as described by Section 350.1, provide guidance on the appropriate way for an ALJ to approach reclassification of a citation.

attempts to schedule a permit conference by phone, Employer's responsible safety officer felt she had done her "due diligence" in calling the Division, and no further attempts were made to secure a permit for the Vacaville project, which was underway. The Board finds that while the ALJ appropriately found a regulatory violation of the safety order, the willful classification of the citation was not properly before the ALJ.

We affirm the regulatory violation alleged in the citation, while amending the penalty to the \$1250 initially proposed by the Division.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 13, 2015

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POS: 4/13/2015