

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

In the Matter of the Appeal of:

J & M, INC.
3826 Depot Road
Hayward, CA 94545

Employer

Docket No. 01-R2D2-120

**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 in the above-entitled matter by J & M, Inc. [Employer] under submission, makes the following decision after reconsideration.

JURISDICTION

Between June 28 and December 19, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at the corner of Walnut and Armstrong Road, Brentwood, California (the site). On December 21, 2000, the Division issued a citation to Employer alleging a serious violation of section¹ 1541.1(a)(1)(B)² [providing adequate protective shoring system]. The Division determined that a serious injury was related to the serious violation and proposed a civil penalty of \$22,500.

Employer filed a timely appeal contesting the existence of the violation. Employer's appeal was subsequently amended to also contest the classification of the violation and the reasonableness of both the abatement requirements and the proposed penalty and to allege 12 additional grounds for relief.

On March 23 and July 25, 2002, a hearing was held before Dennis M. Sullivan, Administrative Law Judge (ALJ), in Concord, California. Ron

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

² The section number was amended upon a motion by the Division at hearing to section 1541.1(a)(1).

Medeiros, Attorney, represented Employer. Mary Allen, Staff Counsel, represented the Division.

On December 12, 2002, the ALJ issued a decision denying Employer's appeal, except that the ALJ reduced the penalty amount to \$18,000 upon his determination that, pursuant to section 335(a)(3), credit for a medium rating for "Likelihood" should have been allowed rather than the Division's rating of high.³

On January 15, 2003, Employer filed a petition for reconsideration. The Division filed an answer on February 14, 2003. The Board took Employer's petition under submission on March 3, 2003.

SUMMARY OF EVIDENCE

Employer digs trenches in the course of its business of constructing underground pipelines. On June 27, 2000, Antonio Cordova [Cordova], Employer's laborer, was seriously injured when a trench he was working in collapsed upon him. The trench had been excavated in Type B soil to a depth of 10 to 12 feet with hydraulic aluminum shores installed at eight-foot horizontal intervals to protect employees on the pipe laying crew. Cordova entered the trench at the behest of Juan Carlos Comacho [Comacho], a regular member of the pipe laying crew, to remove a pile of dirt on the bottom of the trench in front of the already installed portion of the pipeline which had been covered by backfill. Prior to Cordova's entry into the trench, the pipe laying crew had, without contacting the foreman, removed the No. 2 shore,⁴ leaving a horizontal space between the No. 1 and No. 3 shores of at least 16 feet.⁵

The Division's Compliance Officer, Thomas Johnston [Johnston], cited Employer because removal of the shore created a shoring system not in compliance with manufacturer's tabulated data. The citation alleged that Employer failed to protect employees from cave-ins by an adequate protective shoring system and was classified as a serious violation which caused serious injury to Cordova. The citation alleged that the *violation* occurred on June 26, 2000; Johnston testified that the *accident* occurred on June 27, 2000. Employer conceded that the accident actually happened on June 27, 2000.

³ The issue of "Likelihood" is not before the Board, therefore it will not be addressed.

⁴ For purposes of identification the ALJ referred to the shores appearing in the photo exhibits, starting with the northernmost shore at the right side of the photo as No. 1, adjacent to the head of the buried pipeline which had already been installed, and moving to the left in the photo would be shore No. 2, shore No. 3 and so on.

⁵ Compliance Officer Johnston testified that the trench had been altered when he inspected it the day following the accident. He took a photograph [EXH. 12] which he said had two shores put in that were not there at the time of the accident. Those shores were numbered No.2 and No.3; the next shore moving south was referred to as No. 4 which is the No. 3 shore in the original shoring arrangement of the trench, with No. 4 then being the next southerly shore.

ISSUES

1. Was the citation improperly amended to state a different date for the occurrence of the violation?
2. Did the Division establish a serious violation of section 1541.1(a)(1)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer's principal argument in its petition for reconsideration is that the ALJ improperly amended the citation by affirming an alleged violation occurred on June 27, 2000.

1. AMENDMENT OF CITATION

Division Compliance Officer Johnston issued a citation alleging that a violation occurred on June 26, 2000 wherein "the employer failed to protect employees in a trench from cave-ins by an adequate protective shoring system." Employer's argument claims that the ALJ's decision amended the citation to allege the occurrence of the violation on June 27, 2000 and that prior to such amendment the ALJ did not offer Employer any opportunity to respond to such proposed amendment as required by section 386(b).⁶ The Board previously has announced disapproval of post-submission amendments by ALJ's without notice to the parties and without an opportunity to show prejudice by such proposed amendment. In *Naco Industries, Inc.*,⁷ the Board set forth the rule succinctly:

The ALJ erred by not notifying the parties of the intended amendment of Citation No. 3 after the case had been submitted for decision and by not providing them with an opportunity to show that the amendment would be prejudicial, before taking that action.

It went on to reason that:

The notice and opportunity requirement set forth in section 386(b) is a direct result of a legislative mandate, not a rule fashioned by the Appeals Board in exercise of statutory rulemaking discretion. In the Occupational Safety and Health Act of 1973, the legislature

⁶ Section 386(b) provides: "Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby. If such prejudice is shown, the amendment shall not be made."

⁷ Cal/OSHA App. 95-3175 Decision After Reconsideration (Aug. 10, 1999) at p. 6.

mandated the content of certain of the Appeals Board's rules. Labor Code section 6603(a) is one of those statutory mandates. It provides, among other things, that the Appeals Board's rules "... shall be consistent with ... Section[s] ... 11516 of the Government Code," which, in material part, is identical to section 386(b). Therefore, after a case has been submitted for decision the Appeals Board is not empowered to amend a Division action, such as the citation in this case, without providing the parties with the statutorily mandated notice of intent to amend and opportunity to show prejudice. This was not done in this case. Accordingly, the Board voids the post-submission amendment of Citation 3....*Id.* p.7

Subsequently the Board, in *Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*,⁸ reiterated its view of section 386(b) where it said "[i]ndeed, section 386(b) only allows the Appeals Board to amend the issues on appeal or the Division action after a proceeding is submitted for decision if each party has been given notice of the intended amendment and an opportunity to show whether the party will be prejudiced thereby." In fact, the Board emphasized its view by saying "... section 386(b) requires that before ordering the amendment, the ALJ must give notice of the intended amendment to all parties to allow them to show prejudice. In order to give effect to the plain meaning of subsection (b) notice must be given to the parties or the amendment will not be allowed."⁹ [Underline in original] To further emphasize its view, the Board, in a footnote, announced that "only in the rarest instances can we foresee an ALJ moving to amend a citation after submission of the case. And then, only after proper notice to both parties to the appeal."¹⁰

There is nothing, in the Board's view, that would have precluded the Division from making a request to file a motion for an amendment to the citation pursuant to section 371(d)¹¹ during the hearing. The Board notes the citation was clear that the violation occurred on June 26, 2000; the parties litigated the fact that the violation occurred on June 27, 2000.

Good cause may very well have existed that would have allowed the Division to make a motion to conform the pleading to the proof. The Board has long held that a motion could be made during the hearing if good cause is shown for the late amendment. (See *California Erectors, Bay Area, Inc.*)¹² In

⁸ Cal/OSHA App. 98-311, Decision After Reconsideration (Apr. 25, 2001).

⁹ *Id.*

¹⁰ *Id.* at fn.2.

¹¹ A request to file a motion, opposition, or reply later than the times specified in (c) shall be granted if accompanied by a declaration showing good cause for the late filing.

¹² Cal/OSHA App. 93-503, Decision After Reconsideration (Jul. 31, 1998).

this case for reasons unknown to the Board, the Division chose not to move to amend the citation despite overwhelming evidence that the violation occurred on a different date from that set forth in the citation.¹³ Since the Division did not make a motion the Board never had opportunity to determine if good cause would exist for allowing an amendment. The Board finds in this case that the post-submission amendment to the Division's citation was improper because it was done without notice to the parties of the intended amendment and there was no opportunity to show prejudice if the amendment were to be made. Here the Board, as it has done in *Naco Industries, Inc.*,¹⁴ voids the post-submission amendment and restores the citation as it was issued.

2. NO VIOLATION ESTABLISHED

Since no evidence exists in this record regarding a violation occurring on June 26, 2000 a violation of section 1541.1(a)(1) could not be established. Employer's appeal is therefore granted.

DECISION AFTER RECONSIDERATION

The ALJ's decision of December 12, 2002 is reversed. Employer's appeal from a serious violation of section 1541.1(a)(1) is granted and the civil penalty of \$18,000 is set aside.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 6, 2004

¹³ See *Mica Corporation*, Cal/OSHA App. 87-166, Denial of Petition for Reconsideration (Dec. 2, 1987) concerning an entry on the citation pertaining to the date of the alleged violation. Although *Mica* pre-dates the repeal of section 368 which allowed amendments at hearing, the Board considers motions to conform pleadings to proof still a viable avenue of recourse where the violations are fully litigated.

¹⁴ *Supra*.