

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

In the Matter of the Appeal of:

Robert D. Schultz and James A. Noll
dba THE SHOWBOAT LOUNGE
105A Hartnell Avenue
Redding, CA 96002

Employer

Docket No. 01-R2D3-125

**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 the Division of Occupational Safety and Health (the Division) under submission, makes the following decision after reconsideration.

JURISDICTION

On December 7, 2000, the Division conducted a joint inspection with Shasta County officials at a place of employment maintained by Robert D. Schultz and James A. Noll dba The Showboat Lounge (Employer) at 105A Hartnell Avenue, Redding, California (the site).

On December 22, 2000, the Division issued to Employer a citation alleging a willful/serious violation of Labor Code section 6404.5(b) with a proposed civil penalty of \$54,000.

Employer filed a timely appeal contesting the existence and classification of the violation and the reasonableness of both the abatement requirements and proposed penalty. Employer also raised the defense that the Division did not have jurisdiction to cite it directly for violating a provision of the Labor Code.

Manuel Melgoza, a Board Administrative Law Judge (ALJ) heard Employer's appeal in Redding, California on July 3, 2002, and September 11, 2002. On November 19, 2002, the ALJ issued a written decision granting Employer's appeal from the alleged willful/serious Labor Code section violation.

On December 19, 2002, the Division petitioned the Board for reconsideration of the ALJ's decision to grant Employer's appeal. Employer filed an answer to the petition on January 11, 2003. On February 6, 2003, the Board took the Division's petition under submission and stayed the ALJ's decision.

EVIDENCE

The Showboat Lounge is a bar or tavern. It is enclosed by a floor, walls and roof. Employees make and serve customers drinks in the enclosed area. Labor Code section 6404.5(b) prohibits people from smoking and employers from permitting people to smoke in enclosed workplaces. When the Division inspected, the owner or owners¹ of the lounge [Employer] was permitting smoking in the enclosed area while employees were working there. For permitting smoking in the lounge, the Division cited Employer for a willful/serious violation of Labor Code section 6404.5(b) and proposed a \$54,000 civil penalty.

ISSUE

Did the Legislature authorize the Division to enforce the statewide enclosed workplace smoking ban directly against Employer by issuing Employer a citation alleging a willful/serious violation of Labor Code section 6404.5(b)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

After a comprehensive review of applicable and related provisions of the Occupational Safety and Health Act of 1973 (the Act), Labor Code sections 6300-9104, and Board Decisions After Reconsideration, the ALJ concluded that the Division lacked the statutory authority to enforce the statutory smoking ban directly against Employer for violating the statewide prohibition against smoking in enclosed workplaces that the Legislature enacted as Labor Code section 6404.5(b).

Upon our review of the record of this proceeding, the Act, Assembly Bill 13, which became Labor Code section 6404.5(a) through (l) when enacted, and authorities cited, we concur with the ALJ's decision. Accordingly, as supplemented by the following comments, we adopt the ALJ's decision in its

¹ On July 19, 2000, approximately six months before the inspection, Robert Schultz, who then owned and operated the lounge, entered into a written agreement with James Noll to sell Noll the lounge. Under the terms of their agreement, Noll made an initial payment and began operating the lounge, while Schultz retained a security interest in the liquor license for the premises and the property and received a monthly fee as a consultant until Noll paid Schultz the balance of the purchase price. The ALJ notes in footnote 1, page 1, of the decision that "There is a dispute over who the 'Employer' is." The ALJ does not find that the Division cited the wrong employer. He upheld the IIPP citation naming Noll and Schultz dba the Showboat Lounge as Employer. Employer did not petition for reconsideration of that ruling.

entirety and incorporate it here by reference. (A copy of the decision is attached.)

THE LEGISLATURE DID NOT AUTHORIZE THE DIVISION TO ENFORCE LABOR CODE SECTION 6404.5 BY ISSUING A CITATION AGAINST EMPLOYER

1. The Relevant Provisions of Labor Code Section 6404.5(a) and the Division’s Authority to Issue Citations Under Labor Code Section 6317

In Labor Code section 6404.5(a) the Legislature explains why it enacted the enclosed workplace smoking ban—because workplace smoking “is a matter of statewide interest and concern”—and what the Legislature intends the enactment to accomplish—uniform regulation of the statewide concern and employee protection against tobacco smoke. Employee protection is specifically addressed in the below quoted sentence:

It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions. (Emphasis added.)

The Legislature uses “standard” once again, as follows, in Labor Code section 6404.5(g):

(g) The smoking prohibition set forth in this section shall constitute a uniform statewide standard for regulating the smoking of tobacco products in enclosed places of employment and shall supersede and render unnecessary the local enactment or enforcement of local ordinances regulating the smoking of tobacco products in enclosed places of employment. Insofar as the smoking prohibition set forth in this section is applicable to all (100 percent of) places of employment within this state and, therefore, provides the maximum degree of coverage, the practical effect of this section is to eliminate the need of local governments to enact enclosed workplace smoking restrictions within their respective jurisdictions. (Emphasis added.)

Labor Code section 6317 directs the Division to “issue a citation to...[an] employer” under the following circumstances:

If, upon inspection or investigation, the division believes that an employer has violated Section 25910 of the Health and Safety Code² or any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with section 140) of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part³, it shall with reasonable promptness issue a citation to the employer. (Emphasis added.)

The Division argues that by placing Labor Code section 6404.5(b) in Division 5, Part 1 (Part 1), and using the word “standard” to describe the statewide workplace smoking prohibition in Labor Code section 6404.5(a) and (g), the Legislature made Labor Code section 6404.5(b) a “standard ... established pursuant to this part” within the meaning of Labor Code section 6317. The Division argues further that, by so acting, the Legislature intended to and did authorize the Division to enforce the smoking prohibition against employers directly, pursuant to Labor Code section 6317, by issuing offending employers citations alleging violations of Labor Code section 6404.5(b) and proposing civil penalties for the violations “as specified in Chapter 4 (commencing with Labor Code § 6423)” of Part 1.

a. Labor Code Section 6404.5 Was Not “Established Pursuant to this Part” Within the Meaning of Labor Code Section 6317

We disagree with the Division’s argument that Labor Code section 6404.5(b) was “established pursuant to” Part 1. The phrase “established pursuant to” is used in the preceding clause of the first sentence of Labor Code section 6317 to refer the reader to Labor Code, sections 140, et. seq., the sections that create the Standards Board and grant it the powers “pursuant to” which it “establish[es]” “standard[s], rule[s], order[s] or regulation[s]”. It is used for exactly the same purpose in Labor Code section 6305(a) and in section 6308(b), to identify the Standards Board’s statutory authority for adopting “occupational safety and health standards and orders”.

Furthermore, the Legislature uses "established pursuant to" frequently in the Labor Code as a means of referring the reader to the statutory authority for the promulgation of rules or regulations by administrative agencies. For example, Labor Code section 6307.1 provides that the “Department of Health

² This section prohibits the spraying of substances containing “any amount of asbestos” on structures during construction alteration or repair. It is part of Chapter 10.3 [Spraying of Asbestos] (§§ 25910-25913) of Division 20 of the Health and Safety Code and was enacted in 1974. Health and Safety Code section 25913(a)(1) assigns the Division the responsibility of enforcing Chapter 10.3 [§§ 25910-25913] “with respect to the safety of employees as provided in Part 1 (commencing with Section 6300) of Division 5 of the Labor Code.” Subdivision (a)(2) sets forth how and to what extent the Division is to enforce certain requirements of Chapter 10.3. Subdivision (b) assigns the Department of Health Services “the responsibility for the administration and enforcement of this chapter with respect to its environmental and public health purposes....”

³ Labor Code section 6317 is contained within Part 1 [Occupational Safety and Health] of Division 5 (Safety in Employment) of the Labor Code. Part 1 includes sections 6300 through 6719. It is the “this part” referred to in section 6317.

Services shall assist the division in the enforcement of Section 25910 of the Health and Safety Code [asbestos spraying prohibition] in the manner prescribed by a written agreement between the State Department of Health Services and the Department of Industrial Relations, pursuant to [Labor Code] Section 144”, which authorizes the Department of Industrial Relations to enter into enforcement sharing agreements. And, Labor Code section 6428.5 deems an employer’s Injury and Illness Prevention Program “operative...if it meets the criteria for substantial compliance established by the standards board pursuant to Section 6401.7.”

We believe this to be the accepted and understood meaning and usage of “established pursuant to” in legislative and regulatory drafting. Consequently, we do not think the legislature intended to invest the phrase with a different meaning when using it for the second time in the same sentence of section 6317. We believe, instead, that the legislature intended “established pursuant to this part” to direct the reader to the statutory sources of the standard, rule and order-making power by administrative agencies, including the Division, found in “this part”, i.e., Part 1.

The Legislature “established” Labor Code section 6404.5 “pursuant to” Article IV, Section 1, of the Constitution of the State of California, the constitutional authority it exercised to enact Division 5, Part 1 of the Labor Code and all other uniform, statewide, laws. Part 1 is a product of the Legislature’s power to enact laws not a source of that power. We conclude that Labor Code section 6404.5 was not established pursuant to Part 1, within the meaning of Labor Code section 6317.

b. By Using the Word “Standard” in Labor Code Section 6404.5, the Legislature did not Intend to and did not Authorize the Division to Enforce that Statute by Issuing Employers Citations Pursuant To Labor Code Section 6317

In Labor Code section 6404.5(a) the Legislature states that it is creating “a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment” for two purposes. The first purpose is to reduce employee exposure to smoke to an essentially harmless level. The second is “to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions.” To “standardize” is to “make standard or uniform; cause to be without variations or irregularities....” (*Webster’s New World Dictionary*, Third College Edition (1989) p. 1306.)

The statewide enclosed workplace smoking ban standardized the smoking-related conduct required of employers whose employees work in enclosed workplaces and all persons who enter enclosed workplaces. It did not set an occupational safety or health standard for exposure to the airborne carcinogens contained in workplace tobacco smoke, as has been done by the Standards Board for asbestos and other airborne Class A carcinogens. In this,

we see little basis for inferring that the Legislature intended to use the word “standard” to do more than describe the smoking ban as a means of creating statewide uniformity.

In Labor Code section 6404.5(g), “standard” is used aptly to describe the smoking prohibition as “regulating the smoking of tobacco products in enclosed places of employment” so as to “supersede and render unnecessary” all local enactments purporting to regulate that activity. The function of subdivision (g) is to put local governments and all persons on notice that local regulations affecting enclosed workplace smoking are being pre-empted by a state law, Labor Code section 6404.5, and no longer apply. The Legislature’s use of “standard” in communicating that information has no tendency in reason to support the inference that by using the word “standard” twice in Labor Code section 6404.5 it intended to override the exclusive grant of Labor Code section 6404.5 enforcement jurisdiction it made to local law enforcement in subdivision (j).

2. Under Labor Code Section 6404.5, the Division's Enforcement Role is Diminished in Comparison to all Other Unsafe or Unhealthful Workplace Complaints

The Legislature classified violations of the smoking ban, by employers and smokers alike, as mere “infractions”⁴ punishable in accordance with the lenient section 6404.5(j) fine schedule, which provides that:

(j) Any violation of the prohibition set forth in subdivision (b) is an infraction, punishable by a fine not to exceed one hundred dollars (\$100) for a first violation, two hundred dollars (\$200) for a second violation within one year, and five hundred dollars (\$500) for a third and for each subsequent violation within one year. This subdivision shall be enforced by local law enforcement agencies including, but not limited to, local health departments, as determined by the local governing body.

Subdivision (k) is devoted to the Division. It does not assign the Division any role in enforcing Labor Code section 6404.5; that is left exclusively to local

⁴ “Infractions” are the least serious of the three types of “crimes and public offenses” listed in Penal Code section 16, “Felonies”, the most serious, and “Misdemeanors” are between the other two. Penal Code section 19.6 sets forth the following limitations that apply to infractions:

An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail.

The fines for infractions are generally low. Penal Code section 17(d) states that if a code section is listed in section 19.8 or if “the prosecutor files a complaint charging the offense as an infraction”—subject to an inapplicable exception—the offense is an infraction, apparently subject to the Penal Code section 19.8 limitation that, “Except where a lesser maximum fine is expressly provided for violation of any of...[the enumerated] sections, any violation which is an infraction is punishable by a fine not exceeding two hundred fifty dollars (\$250).”

law enforcement. Nor does it enhance the Division's enforcement powers for dealing with smoking complaints.

Under Labor Code section 6309, the Division must respond to all complaints it receives from an employee or employee representative, an affected employer or a "representative of a government agency" indicating "that any employment or place of employment is not safe or is injurious to the welfare of any employee." Subdivision (k) relieves the Division of its Labor Code section 6309 duty to respond to a specified class of smoking related complaints, those against an employer who "has [not] been found guilty pursuant to subdivision (j) of a third violation of subdivision (b) within the previous year." Thus, consistent with the subdivision (j) exclusive delegation of Labor Code section 6404.5 enforcement responsibility to local law enforcement, subdivision (k) reduces the Division's responsibility under Labor Code section 6309 to respond to smoking complaints to less than it is with respect to all other unsafe or unhealthful workplace complaints.

However, as is manifest in the plain language of subdivision (k), and as the Division correctly argues (Petition for Reconsideration, pp. 18-19), subdivision (k) does not deprive the Division of the authority to respond to any enclosed workplace smoking complaint or observed hazard, regardless of whether the complained of employer has been found guilty of previous infractions pursuant to subdivision (j) local enforcement or not.

3. The Legislative History of Labor Code Section 6404.5 Supports an Intended Diminished Enforcement Role for the Division for Response to Complaints of Violations of the Smoking Ban

In his July 14, 1994, letter submitting Assembly Bill 13 [Labor Code section 6404.5] to Governor Pete Wilson for signature, bill author Assemblyman Terry Friedman describes AB 13 as "a strong, yet balanced measure" produced by a broad, bipartisan coalition that "worked hard to craft a compromise which addresses all legitimate, expressed business concerns." He describes AB 13's establishment of "a uniform statewide law" as being "most important" and emphasizes that it "respects local control." (Division Exhibit 1)

Affected departments of the state government, including the Department of Industrial Relations (DIR), prepared and submitted to the Governor "Enrolled Bill Reports" concerning AB 13. The departments summarized and analyzed the bill similarly and recommended that the Governor sign it into law, which he did.

The DIR report, signed by Division Chief John Howard and Department Director Lloyd Aubrey, states in the "Bill Summary" and "Bill Analysis" on the first page/cover sheet of the 11 page report, that the prohibitions against smoking and permitting smoking in enclosed workplaces are to "be enforced by local law enforcement agencies, and violations would be punishable as

infractions carrying specified monetary penalties.” The “Bill Analysis” adds that the bill had “been amended ten times since originally proposed in 1993.”

Under “Enforcement”, on page 4 of the report, DIR states accurately that violations of the bill are to be enforced as infractions, subject to the included fine schedule by local law enforcement. There, DIR also states accurately that the effect of Labor Code section 6404.5(k) is to relieve the Division of the duty to respond to workplace smoking complaints unless the employer has been convicted of three infractions within the preceding year.

On the same page of the report, under “Rulemaking”, DIR points out that the bill does not require it to engage in rulemaking. DIR comments further on rulemaking in its discussion of the bill’s “PRO & CON” at page 5:

The final version of this bill represents an accommodation of numerous criticisms by affected parties. The most important flaw from the Department’s point of view was contained in the original version, which would have necessitated rulemaking and a serious commitment of its resources to a process with an uncertain outcome. The current version makes rulemaking unnecessary and provides the added benefit of placing the primary enforcement burden on local law enforcement agencies.

As amendments of this bill have progressed, the author has been successful in gaining support from numerous groups which were initially opposed, most importantly the Hotel and Motel Association and the California Lodging Industry.

Originally, AB 13 would have directed the Standards Board to adopt an occupational safety and health standard or order attempting to quantify permissible exposure limits to smoke. That was abandoned for a “one-size-fits-all” prohibition against smoking in every enclosed place of employment, but for exemptions for, inter alia, certain areas of lodging and eating establishments, convention centers, tobacco shops, private smoking lounges and truck cabs, applicable under specified conditions. This reduced the law and its enforcement to the broadest, simplest terms. As the Legislature states in subdivision (g), which is quoted above, “...section [6404.5] is applicable to all (100 percent of) places of employment within this state and, therefore, provides the maximum degree of coverage....”

AB 13 takes no account of the dimensions and characteristics of different workplaces, the density of the smoke in an enclosed workplace, available mechanical or other ventilation, the duration of an employee’s exposure, and like factors normally considered in the development of occupational safety and health airborne contaminate standards. Under Labor Code section 6404.5, if an employer permits any one to light a cigar, cigarette or pipe in an enclosed workplace, the employer and the person who lit the tobacco product have

committed infractions of the law. No safety or health expertise is needed to enforce it.

There is a connection between the broad, indiscriminating enforcement net that AB 13 casts and the Legislature's determination to punish violations as minimal penalty infractions. For a bill that makes the lighting of a single cigarette in a bar a crime to attract the support of a bipartisan coalition of legislators and interested parties, the balance of classifying such a violation as a minor infraction is an obvious corollary. For the Legislature to disrupt that balance by authorizing the Division to treat the same offenses as violations of occupational safety and health standards with civil penalties many times larger would defeat the statewide uniformity that Assemblyman Friedman describes as the "most important" accomplishment of AB 13.

4. The Division's Enforcement Authority For Violations of Labor Code Section 6405.5

This case presents the question of what the Legislature intended the Division to do if it did respond to a complaint and found that an employer was permitting someone to smoke in an enclosed workplace. Did the Legislature intend for the Division to:

(1) refer the violation to local law enforcement for enforcement under Labor Code 6404.5(j) as an infraction;

(2) exercise the same statutorily authorized enforcement powers it has with respect to any workplace hazard not covered by an occupational safety and health standard or order adopted by the Standards Board; or,

(3) issue the employer a citation alleging a serious or willful/serious violation of the same statutory prohibition local agencies may only enforce as an infraction?

Indisputably, upon responding to a workplace smoking complaint and finding what it believes to be an unhealthful place of employment within the meaning of Labor Code section 6400(a), the Division may proceed in accordance with either of the first two options.

The means of exercising the first option are obvious. To exercise the second option under the enforcement powers granted by Labor Code section 6308, the Chief of the Division may write a "Special Order" respecting the place of employment believed to be unhealthful. Labor Code section 6305(b) defines "Special Order" as follows:

(b) "Special order" means any order written by the chief [of the Division] or the chief's authorized representative to correct an unsafe condition, device, or place of employment which poses a threat to the health or safety of an employee and which cannot be

made safe under existing standards or orders of the standards board. These orders shall have the same effect as any other standard or order of the standards board, but shall apply only to the employment or place of employment described in the written order of the chief's authorized representative.

A Special Order written by the chief of the Division is an "order established pursuant to this part [Part 1 of Division 5]". Therefore, a violation of a Special Order is one of the three types of violations for which the Division may cite an employer under Labor Code section 6317.

By the third option, advocated by the Division, the Legislature would have authorized the Division to enforce the statutory enclosed workplace smoking ban against any employer permitting smoking by citing the employer for a serious violation of Labor Code section 6404.5(b) with an \$18,000 base penalty. Such a measure would promote disparate (and/or duplicative) enforcement depending on whether local law enforcement or the Division got there first; the sort of "confusion and hardship" that the Legislature purposely enacted Labor Code 6404.5 to eliminate with a statewide smoking ban uniformly enforced pursuant to subdivision (j). The uniformity purpose of the law is stated in subdivisions (a) and (g) and implemented by subdivisions (j) and (k). Moreover, in his letter submitting AB 13 to the Governor for signature, bill author Assemblyman Friedman chronicles the establishment of "a uniform, statewide law..." relieving businesses of "the confusion and competitive disadvantage" caused by the pre-existing lack of statewide uniformity as the bill's "most important" accomplishment.

Had the Legislature intended to grant the Division authority to cite Employers for violations of the statutory smoking prohibition directly, it would have included that provision in the clear and carefully crafted enforcement provisions of Labor Code section 6404.5. Instead, the Legislature enacted subdivisions (j) and (k), which are patently at odds with such an intent. Subdivision (j) defines violations of the subdivision (b) smoking ban in Penal Code terms, as infractions, the lowest type of crime or public offense, punishable only by small fines, and states that Subdivision (j), "shall be enforced by local law enforcement agencies... ." And subdivision (k) reduces rather than increases the Division's responsibilities with respect to responding to workplace smoking complaints.

There is no express delegation of enforcement power to the Division in AB 13. Neither its organization or scheme nor any of its individual parts imply a legislative intent to make the Division the unequally powerful partner of local agencies in its enforcement. Subdivisions (j) and (k) expressly negate that inference, as does the legislative history of AB 13.

Workplace smoking "poses a threat to the health or safety of an employee ... [that] cannot be made safe under existing standards or orders of the standards board." (Labor Code section 6305(b) [definition of Special Order].)

Thus, it is an employee health threat for which the Chief of the Division may write, issue, and enforce a Special Order in exercise of its pre-existing Labor Code section 6308 statutory enforcement powers.

Currently, the Division is free to proceed by Special Order because the Standards Board has not elected to exercise the statutory authority the Legislature granted it in Labor Code Division 1, Chapter 6, sections 140 through 147.2, to promulgate an occupational safety and health standard or order regulating employee exposure to tobacco smoke that supplements the statutory prohibition. In Labor Code section 6404.5 the Legislature recognizes that the Standards Board may at some point determine that the scientific evidence of the causal relationship between workplace exposure to tobacco smoke and the onset of cancer, heart and circulatory disorders and lesser health problems, is sufficiently clear and specific to support the adoption of an occupational safety and health standard or order regulating employee exposure to tobacco smoke that supplements the statutory prohibition. Division Special Orders may help to sharpen the focus and prompt Standards Board action.

CONCLUSION

Until the Standards Board acts, Labor Code section 6404.5 leaves the Division in the same employee safety and health enforcement position with respect to smoking complaints it was in when the Board rejected its attempt to enforce Labor Code section 6401[employer duty to furnish and use safeguards, adopt and use adequately safe and healthful work practices, and do all else reasonably necessary to protect employee life, safety and health] directly by citation as stated in *Gray Line Tours*, Cal/OSHA App. 74-598, Decision After Reconsideration (Sept. 16, 1975). Labor Code section 6404.5 does not single out tobacco smoke-based complaints of unhealthful working conditions from among all other unhealthful condition complaints for the Division to enforce by special means beyond the scope of the Division's normal, pre-existing Labor Code sections 6308 and 6317 enforcement powers. Hence, by citing Employer directly for violating Labor Code section 6404.5, the Division exceeded its enforcement authority.

DECISION AFTER RECONSIDERATION

The Division's petition for reconsideration is denied. The ALJ's decision is reinstated and affirmed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 29, 2003