

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

In the Matter of the Appeal of:

G.T. ALDERMAN, INC.
P.O. Box 3297
Ventura, CA 93006-3297

Employer

Docket No. 05-R4D3-3513

**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 this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On September 16, 2005, the Division of Occupational Safety and Health (the Division) issued to G.T. Alderman, Inc., (Employer) one citation alleging one violation of Title 8, California Code of Regulations.¹ Employer timely filed an appeal, and the matter was assigned to an Administrative Law Judge (ALJ). At the commencement of the scheduled hearing, the Division made an oral motion to amend the citation to conform to proof², which was denied as “unripe”³ as no evidence had yet been submitted. The motion sought to change the section cited from section 1632(h) [guarding requirements for floor *holes*] to section 1632(b)(1) [guarding requirements for floor *openings*].

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

² Board regulations do not contain the phrase “conform to proof”. Code of Civil Procedure section 469 allows for amendments to the pleadings to prohibit a civil defendant from taking advantage of a technical variance between the proof and the pleading when he has not been misled thereby, and this civil procedure rule has been considered in evaluating pleading challenges in administrative adjudications. (*Stearns v. Fair Employment Practice Commission* (1971) 6 Cal. 3d 205.) Although the Code of Civil Procedure does not apply in Board proceedings (*Murray Co. v. Occupational Safety and Health Appeals Bd* (2009) 180 Cal.App.4th 43.), we believe this type of motion is what the Division refers to with the term motion to “conform to proof.” The Supreme Court has indicated it will not condone more stringent pleading rules in administrative settings than are proper in civil proceedings. (*Stearns, supra.*)

³ “Unripe” is the word used by the ALJ in her Decision. She appears to have initially denied the motion because proof had not been submitted at the time the motion was made. As clarified herein, there is no requirement that an amendment to correct an error in the safety order be ruled on only after proof has been submitted. Since the amendment request did not attempt to alter the description of the violation, the motion could have been ruled on at the outset of the hearing. Awaiting the presentation of the evidence is allowed, but not required.

Employer objected to the proposed amendment, but did not pursue a continuance to remedy any prejudice it might have experienced as a result of the proposed amendment.

The description of the alleged violation remained unchanged. It alleged employer improperly guarded a floor *opening* through which an employee fell.

The matter proceeded to hearing. The Division presented evidence establishing the facts of the floor opening violation as alleged in the citation. After the close of the hearing, the Division renewed its motion to amend the citation to allege a violation of section 1632(b)(1), to “conform to the proof”. Employer objected, arguing sections 371.2 and 371 prohibited any amendment after the hearing without a showing of good cause as to why the motion was not brought 20 days prior to the hearing, and further, that the ALJ was required to dismiss the citation since the Division conceded it cited the wrong safety order in the citation. The ruling was deferred, and the parties submitted post-hearing briefs further articulating their arguments.

Thereafter, on November 15, 2007, the ALJ issued a Notice of Intent to Amend the Citation to change the subsection cited from section 1632(h) to 1632(b)(1), on the ground that the same set of facts applied to both subsections. Therein, she stated it was her intent to amend the citation pursuant to section 386(a) and (b), and allowed 20 days for each party to submit written objection to the proposed amendment addressing whether prejudice would result from such amendment.

Employer submitted an objection to the Notice of Intent to Amend the Citation. The Division did not file an objection.

Thereafter, the ALJ granted the Division’s motion to amend the citation rather than amend pursuant to section 386 and her Notice of Intent to Amend Citation. She concluded the evidence established a violation of the amended subsection of the safety order, and denied Employer’s appeal.

The Board ordered reconsideration on its own motion to consider the following issue:

Was the Administrative Law Judge’s decision to amend the citation to change the safety order cited from section 1632(h) to 1632(b)(1) proper?

We conclude the amendment was proper for reasons additional to those articulated by the ALJ, and affirm the denial of the appeal and the imposition of penalties.

EVIDENCE

A. Citation Contents

The Citation contained only the following language:

“Citation 1, Item 1 Type of violation: Serious

“CALIFORNIA CODE OF REGULATIONS, TITLE 8 1632(h)

“(h) Floor holes, into which persons can accidentally walk, shall be guarded by either a standard railing with standard toeboard on all sides, or a floor hole cover of standard strength and construction that is secured against accidental displacement. While the floor cover is not in place, the floor hole shall be protected by standard railing.

“Violation: The employer G.T. Alderman Inc., failed to ensure that the floor opening located on the 2nd floor was protected with railing and toeboard on all sides. On 5/18/05, an employee lost his balance and fell backward into the opening 9 ft to the concrete below.”

B. Hearing Record Regarding Motions to Amend the Citation

At the commencement of the hearing, the Division sought to amend the citation to change the cited safety order from section 1632(h) to section 1632(b)(1). Employer objected, and requested a continuance, to which the Division did not object. Thereafter, Employer withdrew its request for a continuance. Employer complained of general prejudice resulting from the citation not containing reference to section 1632(b)(1), and objected to the Division’s “intentions” and “proceedings.” Employer did not articulate any facts to which it must now answer as a result of the proposed amendment. The Division renewed its motion at the end of the hearing, just prior to submitting the matter for decision. Employer objected to the renewed motion as untimely under section 371.

C. Evidence Presented at the Hearing

The Division offered photographic and testimonial evidence that an employee of Employer fell through a floor opening and suffered injuries that resulted in hospitalization. The floor opening was created to accommodate a stairway in the structure. Employer’s foreman told the Division inspector that the employee fell through the stairway opening before the stairs were installed, that no guardrails or toeboards were in place around the opening at the time of the accident, nor were the staircase steps in place. The photographs depict an opening in the second floor of a building under construction that is the width of a standard staircase, and the length of over twice the width.

D. Summary of Post Hearing Claims of Prejudice By Employer

Employer asserts “prejudice” results from the proposed amendment. First it claims prejudice resulted from the ALJ’s failure to dismiss the citation at the outset of the hearing in that Employer had to file the written objection to the Notice of Intent to Amend.⁴ Next, it asserted prejudice in that such amendment would allow the Division to “prosecute a case it never charged.”⁵ Also, it claims prejudice because by considering a section 386 motion, the ALJ allowed the Division to avoid the “20 day rule” for pre-hearing motions in section 371(c).⁶ Last, it asserts without detail that it was “surprised” by the proposed amendment of the Division. No factual prejudice was articulated in Employer’s opposition paper.

DECISION AFTER RECONSIDERATION

The Occupational Safety and Health Act (Act) contains provisions allowing amendments to citations. Specifically, section 6603 of the Labor Code provides that the Appeals Board’s rules of practice and procedure are to be consistent with Government Code sections 11507 and 11516, *inter alia*. In turn, Government Code sections 11507 and 11516 allow for amendment of accusations in administrative proceedings, both during the proceeding (§ 11507) and any time up to the time a decision is rendered if ordered by the tribunal (§ 11516).

Board regulations implement these amendment provisions. Section 371.2 states pre-hearing amendments shall comply with the rules for filing pre-hearing motions in section 371. Also, section 386 implements procedures for post-submission amendments by the Board or ALJ. Neither directly addresses amendment motions brought at the opening or closing of the evidentiary hearing. Neither prohibits such motions based only on the timing of such motions, as Employer argues. Rather, sections 371 and 371.2 leave such motions to the discretion of the ALJ. We conclude that since no prejudice resulted from the amendment of the subsection here, the ALJ properly exercised her discretion to amend under sections 371 and 371.2. She also properly followed the procedural provisions of section 386, and could have ordered this amendment as a post-submission amendment there under. We affirm the decision based on this alternate reason as well.

⁴ The necessity of articulating the existence of prejudice is not prejudice. If it were, the ALJ’s required Notice of Intent to Amend under section 386 would defeat the intended amendment in every case.

⁵ “Charging” a violation requires a section number and a description of the violative condition in a timely citation. Were the “charge” limited to the section number in the citation, no amendment of the section number would ever be allowed.

⁶ This argument is a claim that a legal error occurred, not that Employer was prejudiced by a change to the Division action.

The Board's pre-hearing motion rules allow this amendment. Section 371.2 requires any motion to amend a citation prior to hearing be made "in accordance with the procedures set forth in Section 371 [of the Board's Regulations]." Section 371(c)(1) in turn specifies that motions be made no later than 20 days prior to hearing, "unless otherwise ordered." Also, motions brought within 20 days of the hearing "shall be granted" if a declaration showing good cause for the late filing accompanies such motion. (§ 371(d).) Thus, these sections do not by their terms prohibit requesting an amendment within 20 days of, or during, the hearing.

Amendments may also be made after the close of the hearing. Section 386 states:

(a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision in order to:

- 1) Correct a clerical error;
- 2) Address an issue litigated by the parties;
- 3) Amend the section number cited in the citation if the same set of facts apply to both the cited and proposed sections;
- 4) Amend any part of the Division action to conform it to statutory requirement.

(b) 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.

Here, it appears a clerical error occurred and the wrong subsection was included in the citation. While the Division attorney did not catch this error until sometime after the 20 day cut off for amendment as of right (§ 371), this is not the kind of amendment that is prohibited by any of our procedural rules. Section 371(c) specifies the ALJ may "otherwise order" an amendment. And, section 386 only prohibits post-submission amendments where prejudice is shown.⁷

First, no prejudice resulted here, as the Employer, who was given ample opportunity to demonstrate prejudice, failed to identify any fact or piece of evidence it was not fully apprised of by the citation and notice of penalty as originally issued. Thus, there is no basis to conclude Employer was in any way

⁷ The Board once held that when the Division is aware of the need to amend a cited section number and elects not to, that the Appeals Board cannot amend of its own accord, as such action infringes on the prosecutorial discretion of the Division, and is a prosecutorial rather than an adjudicative act by the Board. (*County of Los Angeles Metropolitan Transportation Authority (LAMTA)*, Cal/OSHA App. 98-539, Decision After Reconsideration (Dec. 21, 1999).) The text of the rule does not support this additional limitation. If the Appeals Board follows the procedural steps in 386(b), and finds grounds under 386(a), it can amend a citation without a motion so long as prejudice is not shown by the opponent.

misled by the citation. (See *E & G Contractors, Inc* Cal/OSHA App. 81-825, Decision After Reconsideration (Mar. 27, 1987) [employer required to articulate the issue on which it was unable to present evidence in order to validly claim prejudice from a proposed amendment].)

In the absence of prejudice, prohibiting this amendment would merely be recognizing a technical defense⁸ arising from imprecise pleading. This result would conflict with Government Code sections 11507 and 11516, with which our rules must be consistent. (Labor Code § 6603; Govt. Code 11342.2.) And, the great weight of Board precedent similarly does not embrace such technical defenses. (*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).)

Before the enactment of section 386, and the addition of the 20 day provision to section 371, which both occurred in 1992, our rules allowed for amendments to the Division's action, and to employers' appeals, when such amendments were within the same "general set of facts" as the original document, applying the relation back doctrine. (*City of Los Angeles Department of Water and Power*, Cal/OSHA App. 83-503, Decision After Reconsideration (Sep. 23, 1987); *General Motors Assembly Division*, Cal/OSHA App. 80-1197, Decision After Reconsideration (Oct. 5, 1984); *Sheedy Drayage*, Cal/OSHA App. 84-518, Decision After Reconsideration (Dec. 24, 1986).)

The relation-back doctrine determines whether an amendment is allowed, or whether an amendment is really a new violation that falls outside of the originally described general set of facts. (*E & G Contractors*, supra; *Western Roofing*, Cal/OSHA App. 75-029, Decision After Reconsideration (Apr. 23, 1981).) If the amendment is so significant that it falls outside of the originally describe general set of facts, the amendment must be denied if it is made more than six months from the date of the original violation. (§ 371.2; Labor Code § 6317.) A proposed amendment that is within the originally described general set of facts, but adds or changes the factual or legal details such that prejudice would result if the party responding to the amendment was not provided additional time to prepare and opportunity to respond, is the type of amendment prohibited by section 386(b). (*Kenko, Inc.*, Cal/OSHA App. 00-673, Decision After Reconsideration (Oct. 16, 2002).)

The 1992 rule changes were motivated not by a desire to change the rules regarding amendments, but in an effort to avoid granting continuances at

⁸ By "technical defense" we mean a defense that can result in granting the appeal or denying consideration of an affirmative defense due to non-substantive pleading errors. (*Gaehwiler Construction Inc*, Cal/OSHA App. 78-651 Decision After Reconsideration (Jan. 7, 1985).)

the time of hearing.⁹ (Occupational Safety and Health Appeals Board Rulemaking file, certified October 29, 1992.) The problem addressed was the lack of Board resources to accommodate continuances that were needed to remedy prejudice that resulted from otherwise allowable amendments. (*Id.*, Section F, Final Statement of Reasons and Updated Informative Digest, p. 20.) Also, before the 1992 rulemaking, there was no rule allowing for post-submission amendments by the Appeals Board. Since Labor Code section 6603 required the Board, then as now, to have a rule allowing for such procedure, section 386 was enacted. (*Id.* p. 27.)

Thus, the 1992 changes were directed at those amendments that related back to the original citation, but required a continuance. Sections 371 and 371.2 allow these if brought before 20 days prior to the hearing, and due to the early timing, no continuance is needed. If such are brought within the 20 days preceding hearing, but good cause for the late filing is shown, they may be granted and a continuance ordered if necessary. (*California Erectors Bay Area*, Cal/OSHA App. 92-503, Decision After Reconsideration (Jul.31, 1998).) Thus, an ALJ must first determine whether the proposed amendment would require a continuance to cure any prejudice articulated by the opponent. If no prejudice results, the ALJ has the ability to grant the amendment motion brought at any time prior to submission. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After reconsideration (Jun. 10, 2010); *DSS Engineering, Inc*, Cal/OSHA App. 99-1023, Decision After Reconsideration (Jun. 3, 2002); see *California Erectors, Bay Area*, *supra*, [Employer failed to show lack of prejudice to Division to support its at-hearing request to add IEAD to list of defenses, so ALJ properly concluded prejudice would occur and denied amendment of appeal].)

The existence or absence of prejudice is also the determining factor for post-submission amendments under section 386. Here, the post-submission amendment is proper because no party was prejudiced by it. The unchanged description of the violation identified a staircase opening in a second story work area that lacked guarding. Both openings and holes must be guarded with toeboards and railings, or be covered. (§§1632(b)(1), and (h).) Stairway openings are specifically listed as within the definition of “opening.” (§ 1504.) Although a “hole” is an opening 12 inches or less across, and an opening is greater than 12 inches across, Employer was not led to believe it was charged with failing to guard an opening less than 12 inches across on the second story of the worksite. Such a belief would be unreasonable given the language of the averment describing the stairway opening as the violative condition.

Even though the original and amended safety orders address overlapping, and thus different, hazards, we will not assume prejudice results from the amendment. The proper inquiry in evaluating the merits of a motion

⁹ If an amendment causes no prejudice, a continuance would not be needed for any reason.

to amend a citation, notice of penalty, or appeal, is whether the opponent must address new circumstances which it is reasonably unaware of given statements previously made that frame the issues. (§361.3) We decline to follow a hard and fast rule that the existence of different elements among safety orders requires the denial of motions to amend. (See *County Of Los Angeles Metropolitan Transportation Authority (LAMTA)*, Cal/OSHA App. 98-539, Decision After Reconsideration (Dec. 21, 1999).)

This reasoning is consistent with many previous Board decisions both preceding and antedating the 1992 rule amendments. (*A.L.L. Roofing & Building Materials*, Cal/OSHA App. 92-290, Decision After Reconsideration (Sep. 12, 1994); *City of Los Angeles Department of Water and Power*, Cal/OSHA App. 83-503, Decision After Reconsideration (Sep. 23, 1987); *Kenko, Inc.*, Cal/OSHA App. 00-673, Decision After Reconsideration (Oct. 16, 2002).)

Employer argues it will be prejudiced by the amendment in that it would be subject to the affirmance of a violation with which it was never “charged.” This argument lacks merit. There is more to a “charge” than the section number of the safety order allegedly violated. (See § 361.3.) Here, the original and amended Division action not only falls within the same set of facts, they concern the very same description of facts. The real complaint of Employer is that it is not afforded a technical defense when the Division makes a clerical error and cites the wrong subsection of the regulations in a citation. The Board regulations governing amendments do not require the result urged by Employer.

Since the ALJ complied with section 386 by notifying the parties of her intent to amend the subsection in the citation, and the Employer responded and failed to show prejudice would result from the amendment, and the change corrects a clerical error, we approve of the amendment under section 386. We thus affirm the citation and the penalty imposed in the Decision.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Member
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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