

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

In the Matter of the Appeal of:

QYCELL CORPORATION
600 South Etiwanda Avenue
Ontario, CA 91761

Employer

Docket No(s). 11-R3D3-1575 and 1576

**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 above-entitled matter under reconsideration on its own motion, issues this decision after reconsideration.

JURISDICTION

On February 11, 2011, the Division of Occupational Safety and Health (Division) began an investigation of a place of employment maintained by Qycell Corporation (Employer). The investigation resulted in the issuance of two citations alleging six violations of the Occupational Safety and Health Standards contained in Title 8, California Code of Regulations. Employer timely appealed all citations, and the matter came before the Appeals Board in the regular course of proceedings. The parties reached agreement regarding all of the citations and penalties, except for the appropriate penalty for Citation 1, Item 1, which alleged a violation of section 342(a) [failure to timely report serious injury].¹

The Administrative Law Judge (ALJ) issued an order accepting the agreed settlement terms, and resolving the issue of the section 342(a) penalty based on stipulated facts. One stipulation described an amputation injury to an employee resulting from reaching into a machine to clear jammed material. The summary table attached to the Order contained the terms of the agreed disposition of all appealed citations as well as the final assessed penalty for the 342(a) violation. One of these, Citation 2 Item 1, alleged a violation of section 3314(c), failure to de-energize equipment before service, repair, cleaning, etc. To settle Citation 2, Item 1, the accident related characterization was removed

¹ All references are to Title 8, California Code of Regulations unless otherwise indicated.

due to “lack of causation to support the classification” according to the Summary Table. The Board ordered reconsideration on its own motion to verify that good cause supported the withdrawal of the accident-related characterization of the violation of 3314(c) due to the apparent, though not explicit, contradiction between the two descriptions of the cause of the amputation injury.

The parties submitted responses to the order of reconsideration. The Division’s response argued that federal case law requires the Appeals Board to accept any settlement reached by the Division, citing *Cuyahoga Valley Ry Co v. United Transportation Union* (1985) 474 U.S. 3. Employer responded with declarations and a factual summary highlighting its administrative controls, training, and employee management activities related to the injured employee and the events related to the citations. Although federal judicial precedent can be persuasive, it is not binding on California courts, or the Appeals Board. What is binding on the Appeals Board are the Labor Code and the Regulations. Neither allows the Board to abdicate a review of settlements to the “prosecutorial discretion” of Division. Rather, the Board, through its ALJs, must assess whether good cause exists for a settlement. (§§ 364, 364.1 and 364.2.)

As a practical matter, good cause must appear in the Order and/or Summary Table issued by the ALJ so that the Board may meaningfully review the Order. (Labor Code §§ 6609, 6621.) Here, the body of the order describing the accident, and the notation in the Summary Table appear to contradict each other. The body of the Order contained a stipulation which stated, “The accident occurred on Saturday August 29, 2008, at approximately 1200 hours when employee sustained an amputation to his right hand while clearing a jam in the propeller unit of the master batch machine.” The Summary Table stated “Failure to de-energize or disengage machinery while clearing jammed material. DOSH reclassified to Serious from Serious Accident Related/Lack of causation to support the classification.” These two statements appear to refer to the same event, i.e., the amputation injury resulting from reaching into the machine to clear the jam. In the body of the Order the stipulation suggests, though does not explicitly state, that a failure to de-energize before reaching into the machine caused the amputation. But, the Summary Table states there is lack of causation between the failure to de-energize and the injury. Such facial contradiction implies an arbitrary basis for removing the accident-related characterization of the section 3314(c) violation, which would not amount to good cause to support the disposition of issues on appeal. (*PUSD Alexander Hamilton Elementary School*, Cal/OSHA App. 09-0784, Decision After Reconsideration (Jan. 28, 2011).) We ordered reconsideration to review the entire record and determine whether good cause exists in spite of the failure to provide necessary details that could remove or resolve the apparent contradiction in the Summary Table.

Employer's response makes clear it was prepared to offer additional evidence and potentially substantiate a valid defense to the 3314(c) violation itself, or the characterization of the violation as serious accident-related. Faced with additional evidence, and the possibility of not being able to sustain the violation or the penalty, the Division appears to have compromised regarding the penalty, and removed the accident-related characterization from the violation and made other adjustments allowed by section 336. The Division acquired additional information which provided good cause for the disposition reached as the Board's proceedings progressed. (*Anresco, Inc.*, Cal/OSHA App. Decision After Reconsideration (Dec. 20, 1991) [development of facts after the issuance of the citation affords the Appeals Board a basis to impose penalties different from those originally proposed]; see *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302 (civil fines may not be excessive) and *Brydenscot Metal Products*, Cal/OSHA App. 03-3555, Decision After Reconsideration (Nov. 2, 2007).)

To enable the Board to conduct meaningful review, summary tables incorporated into orders accepting settlements must clarify the basis for the ALJs conclusion that good cause exists. If a stipulation agreed to by the parties is at odds with the reason provided by the Division for withdrawing or amending any portion of the action, the Board will likely have difficulty determining the existence of good cause from the documents. Missing, incomplete, or contradictory statements regarding good cause may necessitate reconsideration of orders disposing of appeals by agreement even when, as here, the underlying agreement was appropriate. In this case, a more clear recitation would have been to state that additional evidence regarding potential affirmative defenses was re-evaluated by the Division, and based thereon, it elected to remove the accident-related classification to resolve the matter. Upon review, it is clear the disposition of the appeal as ordered by the ALJ satisfies the good cause threshold of section 364.2, even though the summary table was unclear. The Order upholding the citations and imposing total penalties of \$7,350 is hereby affirmed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: NOVEMBER 22, 2011