

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

L & S CONSTRUCTION, INC.
674 NORTH BATAVIA ST.
ORANGE, CA 92868

Employer

Dockets. 10-R3D1-1821 and 1822

**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 L&S Construction, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 28, 2010, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Villa Park, California maintained by Employer. On April 29, 2010 the Division issued two citations 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 General violation of section 1509(a) [Illness and Injury Prevention Program (IIPP) not maintained], 3395(e)(3) [lack of written heat illness prevention procedures] and 1541(j)(2) [lack of protection from material falling into excavation]. Citation 2 alleged a Serious violation of section 1541.1(a)(1) [no cave-in protection].

Employer filed timely appeals of the citations.

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 April 14, 2011, affirming the violations. The Decision amended the classification of Citation 2 from Serious to Willful Serious. The penalty was raised from \$4950 to \$61,875, for total penalties of \$62,970.

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

On May 5, 2011, the Board on its own motion issued an Order of Reconsideration for Citation 2, to consider whether the ALJ was required to give the parties notice of the intended amendment of the citation's classification from "serious" to "willful serious" and the subsequent penalty increase, under Board Regulation section 386. On May 17, 2011, Employer filed a petition for reconsideration, which the Board took under submission on June 15, 2011.

On February 2, 2012, the Board, on its own motion, issued an Order of Remand to the ALJ for further proceedings. The order granted the Employer the opportunity to show if prejudice would result from the proposed amendment of the classification under section 386. Following the Order, the ALJ provided notice to the parties on April 30, 2012, allowing each to demonstrate if prejudice would result from the proposed amendment. The Division did not respond. Employer timely filed a response, stating that it would have presented additional evidence to dispute the elements of a willful violation, and was therefore prejudiced by the proposed amendment.

The ALJ found that under Government Code section 11516 and prior board decisions, should Employer demonstrate prejudice, a hearing shall be set to cure. The ALJ found prejudice, and ordered the hearing to be reopened to allow Employer an opportunity to introduce additional evidence on the issue of reclassification of the violation.

Employer timely filed a petition for reconsideration of the ALJ's order on October 15, 2012. The Division filed an answer to the petition. The Board took Employer's petition under submission, and ordered that the Order After Remand Reopening the Record of the ALJ be stayed pending this decision after reconsideration.

ISSUE

Did the ALJ Correctly Apply Section 386 and Government Code 11516 by Ordering the Reopening of the Record to Allow Employer to Introduce Additional Evidence on the Issue of the Reclassification of the Violation?

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 ALJ's initial decision of April 14, 2011 amended the classification of Citation 2 from Serious to Willful Serious. The Board's rules of practice and procedure, as well as the Government Code, authorize the Board to amend the issues on appeal.² In this instance, the ALJ failed to provide parties notice of the amendment; the Board ordered the ALJ to provide notice of an intended amendment and opportunity to show that Employer or Division would be prejudiced unless the case is reopened to permit the introduction of evidence, per Government Code section 11516.³ Should the Board find an employer prejudiced by the proposed amendment of the citation, the Board may then cure that prejudice by continuing the proceeding to allow introduction of additional evidence. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).)

Employer, in its petition, argues two points: Employer first argues that the ALJ exceeded the scope of the Board's order of remand, by ordering the record to be reopened and scheduling a further hearing after determining Employer had established prejudice. The Board's order granted the ALJ the opportunity to "affirm or amend her decision as appropriate." (*Order of Remand*, Docket No. 10-R3D1-1822 (Feb. 2, 2012).) The ALJ determined that to cure prejudice, further proceedings were required; the ALJ's reopening of the record did not constitute error.

² The Board has a mandate to be consistent with Government Code sections 11507 and 11516, under section 6603 of the Labor Code. (*G.T. Alderman, Inc.*, Cal/OSHA App. 05-3513, Decision After Reconsideration (Nov. 22, 2011). The Appeals Board's rules of practice and procedure must be consistent with those sections; the Government Code, at sections 11507 and 11516, allows for the amendment of accusations in administrative proceedings such as those of the Appeals Board, both during a proceeding and after submission for decision, if so ordered by the tribunal.

³ Government Code section 11516 states: The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Employer also argues that while the Board has a responsibility to comply with the Labor Code, its rejection of *Marin Storage and Trucking, Inc.*, Cal/OSHA App. 90-148, Decision After Reconsideration (Oct. 25, 1991)—a Board decision which found that an ALJ engaged in error by notifying the parties of his intent to amend a citation’s classification, and then amending after holding additional proceedings— was based on unsound logic.

The Board is not in agreement. While Employer is not convinced by the Board’s interpretation of its section 386 and the applicable Government Code sections, “[t]he contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.” (*Farm Sanctuary, Inc. v. Department of Food & Agriculture*, (1998) 63 Cal. App. 4th 495, 505, citing *Environmental Protection Information Center v. Department of Forestry & Fire Protection*, (1996), 43 Cal. App. 4th at pp. 1021-1022). The Board, having reviewed the history and authority for sections 371, 371.2 and 386 of its regulations, interprets these sections as authorized by the Labor and Government Codes to allow for amendment of citations and appeals where appropriate.⁴ (*Duininck Bros., Inc.*, Cal/OSHA App. 06-2870, Decision After Reconsideration and Order of Remand (Apr. 13, 2012).) A prior Decision After Reconsideration such as *Marin Storage and Trucking*, which did not interpret Board regulations in light of the mandate of governing statutes should not be relied upon for guidance on this issue, and as stated in *Bay Area Rapid Transit District*, we decline to follow its logic.

The Board finds that the ALJ did not commit error or exceed the scope of her authority by finding prejudice and ordering further proceedings to allow Employer the opportunity to cure that prejudice. The ALJ’s Order After Remand Reopening the Record is affirmed. The matter is returned to hearing operations for further proceedings.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 6, 2014

⁴ Section 386 has been amended as of July 1, 2013. We reach this outcome applying either the current section 386 or the pre-amendment version.