

2017

**John Kuhni Sons, Inc., a Utah Corporation, Petitioner, v. Utah Labor Commission, Occupational Safety and Health Division, Respondent.**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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JOHN KUHNI SONS, INC., a Utah  
corporation,

Petitioner,

v.

UTAH LABOR COMMISSION,  
Occupational Safety and Health Division,

Respondent.

Appeal No. 20160953

Case No. 531093282

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**BRIEF OF PETITIONER**

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Appeal from the Appeals Board of the  
Utah Labor Commission  
Case No. 531093282

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FILED  
UTAH APPELLATE COURTS

MAR 06 2017

**LIST OF THE PARTIES AND THEIR  
DESIGNATIONS IN PROCEEDING BELOW**

Petitioner	<i>John Kuhni Sons, Inc.</i>
Respondent	<i>Utah Labor Commission, Occupational Safety and Health Division</i>

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over the Petition for Review pursuant to Utah Code sections 34A-1-303, 63G-4-403, and 78A-4-103 (“[I]f an order is appealed to the court of appeals . . . the court of appeals has jurisdiction to review, reverse, remand, or annul any order of the commissioner or Appeals Board.”).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**ISSUE 1.** The Utah Occupational Safety and Health Act gives employers a 30-day window to contest a citation. The 30-day right to contest a citation is triggered by the receipt of notice sent by “certified mail.” Did the Board err in concluding that a notice sent via private carrier—as opposed to the United States Postal Service—was through “certified mail”?

**Determinative Law:** Utah Code Ann. § 34A-6-303(1).

**Standard of Review:** An agency’s interpretation of a statute is a pure question of law reviewed by an appellate court for correctness. *See Hughes Gen. Contractors, Inc. v. Utah Labor Comm’n*, 2014 UT 3, ¶ 25, 322 P.3d 712 (“[W]e have retained for the courts the de novo prerogative of interpreting the law, unencumbered by any standard of agency deference.”); *Cook v. Dep’t of Commerce*, 2015 UT App 64, ¶ 12, 347 P.3d 5 (“[W]e review statutory interpretations by agencies for correctness, giving no deference to the agency’s interpretation.”) (quoting *Harrington v. Industrial Comm’n*, 942 P.2d 961, 963 (Utah Ct. App. 1997)).

**Statement of Preservation:** Kuhni preserved this issue in various arguments and briefs submitted in the proceedings below. (R. 63-64, 94-96, 143-147.)

**ISSUE 2.** Due process requires that the Labor Commission’s method of serving a notice of citation be reasonably certain to inform the employer. The Labor Commission sent Kuhni notice of the citation by e-mail, but the Labor Commission

**gave no evidence that Kuhni received the e-mail or that Kuhni's e-mail addresses were reliable means of service. Did the Board err in concluding that the Labor Commission's email to Kuhni satisfied due process?**

**Determinative Law:** U.S. Const. amend. XIV, § 1; Utah Const. Art. I, § 7;

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

**Standard of Review:** A “due process claim presents a mixed question of fact and law that we review de novo for correctness. But we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.” *See State v. Hales*, 2007 UT 14, ¶ 35, 152 P.3d 321.

**Statement of Preservation:** Kuhni preserved this issue in various arguments and briefs submitted in the proceedings below. (R. 64-67, 96-98, 147-149.)

**ISSUE 3.** Due process requires that the Labor Commission's form of notice of citation reasonably convey to employers their 30-day right to contest the citation. The notice of citation at issue here was a fifteen-page document, with the notice of Kuhni's 30-day right to contest the citation on only the third and fourth pages. Did the Board err in concluding that the content of the Labor Commission's notice satisfied due process?

**Determinative Law:** U.S. Const. amend. XIV, § 1; Utah Const. Art. I, § 7;

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

**Standard of Review:** A “due process claim presents a mixed question of fact and law that we review de novo for correctness. But we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.” *See State v. Hales*, 2007 UT 14, ¶ 35, 152 P.3d 321.

**Statement of Preservation:** Kuhni preserved this issue in various arguments and briefs submitted in the proceedings below. (R. 64-67, 96-98, 147-149.)



## DETERMINATIVE PROVISIONS

Utah Code Ann. § 34A-6-303(1).

### STATEMENT OF THE CASE

#### *Nature, Course, and Disposition of Proceedings*

This case is about a citation issued by the Labor Commission to Kuhni for a workplace accident. (R. 151.) Kuhni contests the citation. (*Id.*) But the Administrative Law Judge and Utah Labor Commission Appeals Board (the “*Appeals Board*”) never reached the merits of the Labor Commission’s citation because the Administrative Law Judge dismissed Kuhni’s case on jurisdictional grounds, and the Appeals Board affirmed the Administrative Law Judge’s dismissal.<sup>1</sup> (R. 80-82, 151-154.) Kuhni now seeks judicial review of the Appeals Board’s decision.

#### *Statement of Facts*

In early 2016, the Labor Commission cited Kuhni for three safety violations—assessing Kuhni with a \$76,250.00 fine. (R. 151.) The Labor Commission delivered a notice of citation to Kuhni (the “*Citation Notice*”) by Federal Express, with return receipt requested.<sup>2</sup> (*Id.*) The Citation Notice consisted of fifteen pages. (R. 21-37.) Notice of Kuhni’s 30-day right to contest the citation appeared on pages three and four of the Citation Notice. (R. 25-26.) With the exception of some additional underlining, the provisions warning Kuhni of its 30-day right to contest the citations were the same font,

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<sup>1</sup> The Appeals Board’s Order Affirming ALJ’s Decision is attached as **Exhibit 1** to the Addendum following this brief.

<sup>2</sup> The Citation Notice submitted by the Labor Commission to the Administrative Law Judge is attached as **Exhibit 2** to the Addendum following this brief.

print, and type as the surrounding text. (*Id.*) Three weeks later, the Labor Commission sent two emails to email addresses the Labor Commission presumably believed were controlled by Kuhni, stating that Kuhni had until March 26, 2016 to contest the citations. (R. 39-41, 151.) Kuhni notified the Labor Commission of its intent to contest the citations on June 6, 2016. (R. 151.)

Soon after Kuhni notified the Labor Commission that it was contesting the citations, the Labor Commission filed a motion to dismiss Kuhni's case based on Utah Code section 34A-6-303. (R. 13-61.) In its motion, the Labor Commission gave the Administrative Law Judge evidence of both the notice by Federal Express and the notice by email. (*Id.*) But aside proof that the Labor Commission sent the email, the Labor Commission provided no evidence that Kuhni monitored the two "@kuhnisons.com" email addresses, that Kuhni was likely to receive any messages sent to those email addresses, or that Kuhni actually received the email the Labor Commission sent. (*Id.*)

### **SUMMARY OF ARGUMENT**

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." *See Olmstead v. U.S.*, 277 U.S. 438, 485, 48 S.Ct. 564, 575 (1928) (Brandeis, J., dissenting). In this case, the Labor Commission cited Kuhni \$76,250.00 for a workplace accident. When Kuhni contested the citation, the Labor Commission moved to dismiss Kuhni's notice of contest based on a technicality—namely, Kuhni filed its notice of contest over thirty days after it received the citation from the Labor Commission. Kuhni opposed the Labor Commission's motion to dismiss on two grounds: First, the Labor Commission's notice

to Kuhni was inadequate to trigger the 30-day limit on Kuhni's right to contest the citation. And second, the Labor Commission's notice failed to satisfy Kuhni's due process rights. In short, the Labor Commission could not hold Kuhni to a timing technicality when the Labor Commission itself failed to follow the procedures for imposing that timing requirement on Kuhni.

The Labor Commission's notice to Kuhni failed to trigger the 30-day limitation on Kuhni's right to contest the citation. Under Utah Code Section 34A-6-303(1), notice of a citation to an employer by "certified mail" triggers a 30-day limitation period on the employer's right to contest the citation. The plain and ordinary meaning of "certified mail"—as set forth in case law and various dictionaries—is delivery through the United States Postal Service, not any private carrier. The Labor Commission sent notice of the citation to Kuhni via Federal Express. Hence the Labor Commission's notice to Kuhni failed to trigger the 30-day limit on Kuhni's right to contest the citation. The Appeals Board therefore erred when it concluded that (i) Federal Express was sufficient to trigger the 30-day limitation on Kuhni's contest right, and (ii) Kuhni's actual receipt of the citation was enough under section 303 to trigger the 30-day limitation period.

Further, the notices the Labor Commission sent to Kuhni failed to satisfy due process. Due process looks to both the method and the content of the notice. The Labor Commission sent Kuhni notice of the citation via Federal Express and by email. While delivery of the notice of citation by Federal Express may satisfy due process requirements, the content of the citation package did not conspicuously convey to Kuhni that it had only thirty days to contest the citation. In contrast, while the content of the

Labor Commission's email to Kuhni may satisfy due process requirements, the method of notice by email was insufficient where the Labor Commission provided no evidence to the Administrative Law Judge that Kuhni monitored those email addresses and was likely to receive information transmitted to those addresses. Consequently, the Appeals Board erred in concluding that the Labor Commission's notices to Kuhni satisfied due process.

In sum, the Court should reverse the Appeals Board's Order because (i) Kuhni's notice of contest was timely, and (ii) the Labor Commission's notices failed to satisfy due process. This case should be decided on the merits as opposed to technicalities.<sup>3</sup>

### ARGUMENT

#### **I. THE APPEALS BOARD ERRED IN HOLDING THAT NOTICE VIA PRIVATE CARRIER TRIGGERS AN EMPLOYER'S 30-DAY RIGHT TO CONTEST A CITATION.**

Under Utah Code section 34A-6-303(1)(b), an employer's 30-day right to contest a citation is triggered by "the receipt of the notice issued by the division." The "notice" referenced in subsection (b) is defined in subsection (a), which requires notice to the employer by "certified mail." *Id.* 303(1)(a). "[C]ertified mail" has a common usage with only one meaning that does not include delivery by Federal Express." *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007). Thus, the Labor Commission did not provide notice as required by Section 303. Accordingly, the Labor Commission never

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<sup>3</sup> Kuhni raises three issues on appeal and divides its brief into two arguments. The first argument section addresses the first issue raised on appeal—whether the Appeals Board properly interpreted the term "certified mail." The second argument section addresses the latter two issues raised on appeal—whether the Labor Commission's notices to Kuhni satisfied due process. The Court should rule in Kuhni's favor on both arguments, and both arguments are independent reasons for reversing the Appeals Board's Order.

triggered the 30-day limitation on Kuhni's right to contest the citation, and Kuhni's notice of contest—filed thirty days after the Labor Commission's notice—was timely.

Despite the timeliness of Kuhni's notice of contest, the Appeals Board affirmed the dismissal of Kuhni's case based on two erroneous interpretations of section 303: (1) the Appeals Board interpreted "certified mail" to include delivery via private carrier as opposed to only the United States Postal Service; and (2) the Appeals Board concluded that even if Kuhni did not receive notice by "certified mail," actual receipt of the citation was sufficient to trigger the 30-day limitation on Kuhni's right to contest the citation. *See Order, 2.* The Court should reverse the Appeals Board's Order and conclude that Kuhni's notice of contest is timely.

**A. The Term "Certified Mail" Requires Delivery Via the United States Postal Service as Opposed to Delivery Via Private Carrier.**

The Appeals Board interpreted the term "certified mail" to not require "that delivery of a citation must be performed by the U.S. Postal Service." *See Order, 2.* The Appeals Board based its interpretation on the fact that there is no "Utah precedent" for Kuhni's interpretation. But the Appeals Board failed to identify any Utah precedent precluding Kuhni's interpretation. More importantly, the Appeals Board ignored the plain meaning of "certified mail" and case law interpreting similar statutes, which both demonstrate that the term "certified mail" encompasses delivery by the United States Postal Service.

First, the plain meaning of "certified mail" excludes delivery via a private carrier. For instance, in its Motion for Summary Disposition, the Labor Commission relied on the

following definition of “certified mail” from the Oxford English Dictionary: “A postal service in *which sending and receipt of a letter or package are recorded.*” See Motion for Summary Disposition, 8 (quoting Oxford English Dictionary) (emphasis added by Labor Commission). But in relying on this citation, the Labor Commission ignored the first three words of the definition: “*A postal service* in which sending and receipt of a letter or package are recorded.” *Id.* (emphasis added). The Oxford English Dictionary defines the term “postal service” as the “US term for post office.” See *Postal Service*, Oxford English Dictionary (Online), available at <https://en.oxforddictionaries.com/>. And “post office” is defined as “[t]he public department or corporation responsible for postal services.” See *Post Office*, Oxford English Dictionary (Online). The Labor Commission cannot dispute that Federal Express is not a public department responsible for mail.

Other dictionaries also support an interpretation of “certified mail” that excludes delivery by private carriers. For example, the term “certified mail” in Black’s Law Dictionary is merely a subset for the term “mail,” which Black’s Law Dictionary defines as “[o]ne or more items that have been properly addressed, stamped with postage, and deposited for delivery in the *postal system.*” See *Mail*, Black’s Law Dictionary (10th ed. 2014) (emphasis added). The “postal system” is then defined as “[a]n *official system* for delivering such items; the postal system.” See *Postal System*, Black’s Law Dictionary (10th ed. 2014) (emphasis added). Hence, according to multiple dictionaries, the term “certified mail” does not encompass a private carrier like Federal Express.

Second, case law interpreting “certified mail” in other statutes supports a reading that excludes delivery by private carrier. To illustrate, in *Foote Memorial* the court faced

a similar argument. In that case, the court rejected the Appeals Board's interpretation of "certified mail" noting that

[t]he term "mail" is defined as "letters, packages, etc., sent or delivered by the *postal service*." *Random House Webster's College Dictionary, supra* (emphasis added). In turn, "postal service" refers to the "post office," which is "an office or station of a government postal system at which mail is received and sorted, from which it is dispatched and distributed...." *Id.*

*See W.A. Foote Memorial Hosp. v. City of Jackson*, 686 N.W.2d 9, 13-14 (Mich. Ct. App. 2004). Thus, the court held, "the plain and ordinary meaning of the term 'certified mail' in M.C.L. § 205.735(2) encompasses only 'mail' sent by the United States Postal Service—not delivery by private carrier services." *Id.* Likewise, the plain and ordinary meaning of the term "certified mail" in section 303 encompasses only "mail" sent by the United States Postal Service, not delivery by Federal Express. *See also Leatherbury*, 939 A.2d at 1288 ("'[C]ertified mail' has a common usage with only one meaning that does not include delivery by Federal Express.").

Moreover, interpreting section 303 to allow delivery by private carriers contravenes the public policy concerns the Utah legislature likely had in mind in choosing the term "certified mail." If the Labor Commission's definition of "certified mail" is accepted, and section 303 is satisfied so long as someone records the sending and receipt of the letter, then "[c]onceptually, any carrier or person could claim to be a carrier service and offer up a package receipt as genuine." *See Foote Memorial*, 686 N.W.2d at 15. The legislature's directive that notice of the citation to be delivered via the United States Postal Service ensures that return receipts are reliable, trustworthy, and uniform—something that cannot be accomplished if any person off the street is allowed to claim

they recorded a delivery. *Id.* (holding that “the Legislature clearly intended a certain degree of uniformity regarding where and with whom the record of mailing would be maintained to avoid such complications invoking the jurisdiction of the Tax Tribunal.”). Further, another purpose of section 303 is to fix a clear point in time from which employers know they have thirty days to contest a citation. If the plain and ordinary meaning of “certified mail” is via the United States Postal Service, and the Court broadens that term to include delivery via private carrier, it creates a due process dilemma by holding employers to a standard that section 303 never gives them notice of.

The Court should therefore reverse the Appeals Board’s Order because it erroneously interpreted “certified mail” to include delivery by Federal Express.

**B. Actual Receipt of a Citation Does Not Trigger the 30-Day Limitation on an Employer’s Right to Contest a Citation.**

The Appeals Board concluded that “[m]ore important than parsing the term ‘certified mail’ is the fact that Kuhni does not dispute receiving the citation . . . . The fact that Kuhni actually received the citation means that the notice requirement was satisfied regardless of which third-party carrier delivered it.” *See* Order, 2. But in making this conclusion, the Appeals Board ignored the plain text of Section 303. No statute, case law, or other authority states that actual receipt of a citation is sufficient to trigger the 30-day limitation period as opposed to notice by “certified mail” as required by section 303. The Appeals Board never cited any such authority for this proposition. And it was improper for the Appeals Board to ignore the text of section 303 to create an actual receipt exception by judicial fiat.



“A fundamental rule of statutory construction is that statutes are to be construed according to their plain language.” *See O’Keefe v. Utah State Retirement Bd.*, 956 P.2d 279, 281 (Utah 1998). “[U]nambiguous language may not be interpreted to contradict its plain meaning.” *Id.* Further, “Provisions within a statute are interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters. . . . [E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” *See Berneau v. Martino*, 2009 UT 87, ¶ 12, 223 P.3d 1128. “It is our function to apply the law as written by the legislature . . . and not to legislate because we think the law should be otherwise.” *See Fay v. Industrial Commission*, 114 P.2d 508, 516 (Utah 1941).

An example of statutory interpretation similar to this case is found in *Lopez*, where petitioner and agency disputed whether petitioner’s appeal was timely. *See Lopez v. Career Service Review Bd.*, 834 P.2d 568, 571 (Utah Ct. App. 1992). The statute at issue required a party to appeal an agency’s decision within 30 days of the “order constituting the final agency action,” which included a “written order.” *Id.* (quoting Utah Code Ann. §§ 63-46b-13, 63-46b-14). More than 30 days before petitioner filed his appeal, the agency’s hearing officer sent petitioner a letter stating, “This letter is to notify you that your motion [to reconsider] has not persuaded me to change my decision. *Id.* To determine the meaning of “written order” and whether the letter qualified as one, this Court turned to an entirely separate provision which mandated what was to be included in an order. *Id.* at 572 (quoting Utah Code Ann. § 63-46b-10). The Court held—based on that provision explaining the contents of an order—that the letter sent by the hearing

officer was not a “written order.” Petitioner’s appeal, the Court held, “[was] therefore timely.” *Id.*

Like in *Lopez*, where the Court determined what was meant by “written order” by looking to the required contents of a written order, here, the Court should determine what is meant by “notice issued by the division” in subsection 303(1)(b) by looking to the required method of issuing notice in subsection 303(1)(a). *See* Utah Code Ann. § 34A-6-303(1). In other words, the Court should interpret the “notice” referenced in subsection 303(1)(b) as the same notice required by subsection 303(1)(a)—notice by “certified mail.” *See id.* The two provisions must be read harmoniously. Further, had the legislature intended the Appeals Board’s interpretation of section 303—which triggers the 30-day limitation period upon the actual receipt of any notice by the division—the legislature would have used in section 303 the words *any notice* or *actual notice*, not the words “*the notice* issued by the division.” *See id.* The Appeals Board was not permitted to substitute its policy preferences for those adopted by the legislature in section 303.

Accordingly, the Court should reverse the Appeals Board’s Order because without any thirty-day clock ticking, Kuhni’s notice of contest was timely.

## **II. THE TRIAL COURT ERRED IN DECIDING THAT THE NOTICES THE LABOR COMMISSION SENT TO KUHNI SATISFIED DUE PROCESS.**

In determining if a notice satisfies due process, courts look to both the “method and content” of the notice. *See, e.g., Buckley v. Engle*, No. 8:07CV254, 2010 WL 4064985, at \*2 (D. Neb. Oct. 14, 2010). The Labor Commission sent two notices to Kuhni. First, the Labor Commission sent Kuhni a fifteen-page citation package via

Federal Express (the “*Citation Package*”). (R. 21-37.) Second, the Labor Commission sent an email to two email addresses. (R. 39-41.) As explained below, neither of these notices satisfied due process. The content of the Citation Package failed to reasonably convey to Kuhni its 30-day right to contest the citation. Likewise, the Labor Commission failed to provide evidence that the email addresses it used were methods of notice reasonably certain to inform Kuhni. Consequently, the Court should reverse the Appeals Board’s Order because the notices sent by the Labor Commission failed to satisfy due process.

**A. The Appeals Board Erred in Concluding That the Content of the Citation Package Reasonably Conveyed Kuhni’s 30-Day Contest Right.**

“Precedent teaches that government notices must be clear.” *K.G. v. Department of Public Welfare*, 2012 WL 8670197, at \*8 (Pa. Commw. Ct. June 15, 2012) (unpublished). Notices violate due process when important provisions fail to conspicuously stand out. *See, e.g., Brody v. Village of Porter Chester*, 434 F.3d 121, 130 (2d Cir. 2005) (“[T]he notice sent to affected property owners must make some conspicuous mention of the commencement of the thirty-day review period to satisfy due process.”); *In re Millspaugh*, 302 B.R. 90, 100, 103 (Bankr. D. Idaho 2003) (holding that “considerations of due process mandate great caution and require that the creditor receive specific notice (not buried in a disclosure statement or plan provision),” and that notice to a creditor “must be clearly and conspicuously identified and explained in the plan or motion”). “Just as with the form of notice, the content of the notice must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.’

This includes the corollary requirement that the notice ‘must be of such nature as [to] reasonably convey the required information.’” *See Brody*, 434 F.2d at 130 (quoting *Mullane*, 339 U.S. at 314).

For example, in *O’Connell*, the question was whether the defendant steamship company gave sufficient notice to plaintiff of the contractual limitations period for filing suit. *See O’Connell v. Norwegian Caribbean Lines, Inc.*, 639 F. Supp. 846, 846 (N.D. Ill. 1986).<sup>4</sup> The actual statement limiting plaintiff’s right to file suit was buried in twenty-seven paragraphs of terms and conditions, which were found on the last two pages of a five-page ticket packet. *Id.* at 848-49. The steamship company argued that the plaintiff nonetheless had notice of this statement because of a sentence on the face of the ticket incorporating the terms and conditions. *Id.* at 849-50. The sentence, the defendant pointed out, was in “red ink, bold print, and capital letters.” *Id.* at 850. But the court disagreed that the incorporation sentence “reasonably communicated . . . the contractual terms contained in other parts of the ticket.” *Id.* The court held that

although the printing is indeed in capital letters and red ink, when it is considered in the context of the entire page, it cannot be considered eye-catching, prominent, or inescapably obvious. To the contrary, the presence of other, larger, bolder, red lettering on the same line tends to artfully camouflage the incorporation statement.

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<sup>4</sup> Though *O’Connell* did not expressly address due process and involved a voluntary contractual relationship, it is nonetheless pertinent because it applies the same standard of reasonableness and conspicuousness. *See id.* at 849 (holding that notice must contain “conspicuous language” and be “reasonably communicated”). Furthermore, a government agency imposing an involuntary limitation on someone’s rights should be held to a higher standard than the notice required in a voluntary commercial transaction.

*Id.* at 850. Thus, the court held, the “incorporation statement [was] not sufficiently conspicuous” to give the plaintiff notice of the shortened limitations period. *Id.* at 851.

Nothing in the Labor Commission’s notice to Kuhni reasonably and conspicuously communicates Kuhni’s 30-day right to contest the citation. Like the contract in *O’Connell*, where defendant buried the limitations provision in twenty-seven paragraphs on the fourth and fifth page, the Labor Commission buries the contest provision in the third and fourth pages of its fifteen-page notice. Worse still, those fifteen pages consist of approximately 80 paragraphs. And while the contest provision may be in underlined and bold print, it is in no way eye-catching because it appears in the first paragraph of the fourth page with no heading above it and substantial and prominent white space beneath it. The reasonable person flipping through the notice—assuming they even made it as far as the fourth page—would not realize the importance of the contest provision, especially given the other headings, headers, and more prominent print that would draw their attention. In short, the Labor Commission needs to place notice of the 30-day right to contest clearly and conspicuously on the first page. As put by commission member Hatch in his concurrence, “the served Citation and Notice of Penalty is not written with clarity. . . . [The Labor Commission] might be well advised to re-write their form citation to avoid similar arguments to that of [Kuhni] in the future.” *See Order*, 4.

**B. The Appeals Board Erred in Concluding That the Labor Commission’s Email Was Reasonably Certain to Inform Kuhni of Its 30-Day Contest Right.**

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *See Mullane*, 339 U.S. at 314. “As a general matter, in those cases where service by email has been judicially approved, the movant supplied the Court with some facts indicating that the person to be served would be likely to receive the summons and complaint at the given email address.” *See NYKCool A.B. v. Pacific Intern. Services, Inc.*, 66 F.Supp.3d 385, 391 (S.D.N.Y. 2014). For instance, in *Ehrenfeld*, the court declined to allow service by email because “Plaintiff provided no information that would lead the Court to conclude that Defendant . . . monitors the e-mail address, or would be likely to receive information transmitted to the e-mail address.” *See Ehrenfeld v. Salim a Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2005 WL 696769, at \*3 (S.D.N.Y. Mar. 23, 2005); *see also Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at \*2 (S.D.N.Y. June 7, 2012) (rejecting request for alternative service via email where “Chase has not set forth any facts that would give the Court a degree of certainty that . . . the email address listed on the Facebook profile is operational and accessed by Nicole.”); *NYKCool*, 66 F.Supp.3d at 390-91 (concluding that “NYKCool’s attempt to serve Noboa by e-mail was [not] sufficient under Rule 4(f) and the Due Process Clause.”).

Like in *Ehrenfeld*, where the plaintiff provided no facts showing that the defendant “monitor[ed] the e-mail address” or “would be likely to receive information transmitted to the e-mail address,” the Labor Commission provided no facts below showing that Kuhni monitored the two email addresses or that Kuhni was likely to receive the notice sent to those email addresses. (R. 15-16.) Accordingly, it was improper for the Appeals

Board to affirm the dismissal of Kuhni's case. Without any evidence beyond the fact that the Labor Commission sent notice to the two email addresses, the Appeals Board could not conclude that the email addresses were reasonably calculated to inform Kuhni of its 30-day contest right.

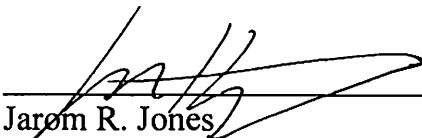
In short, the Appeals Board erred in concluding that the Labor Commission's notices satisfied due process because (1) the content of the Citation Package failed to reasonably convey to Kuhni that it had only 30 days to contest the citation; and (2) the method of the email notice was not reasonably calculated to convey to Kuhni the 30-day limitation on Kuhni's right to contest the citation.

## CONCLUSION

The Appeals Board erred in concluding that notice via Federal Express triggered the 30-day limitation period on Kuhni's right to contest the citation. Section 303 requires notice via "certified mail." And the plain and ordinary meaning of "certified mail" is delivery through the United States Postal Service as opposed to any private carrier. Likewise, the Appeals Board erred in concluding that the Labor Commission's notices to Kuhni satisfied due process. The content of the Citation Package did not conspicuously convey Kuhni's 30-day contest right. And the email that the Labor Commission sent to the two email addresses, without evidence that Kuhni monitored or relied on those email addresses, was not reasonably calculated to inform Kuhni of its rights. In short, the Court should reverse the Appeals Board's Order dismissing Kuhni's case and order Kuhni's notice of contest to proceed on the merits.

RESPECTFULLY SUBMITTED this 6th day of March, 2017.

BENNETT TUELLER JOHNSON & DEERE

  
\_\_\_\_\_  
Jarom R. Jones  
Jeremy C. Reutzel

*Attorneys for Petitioner*

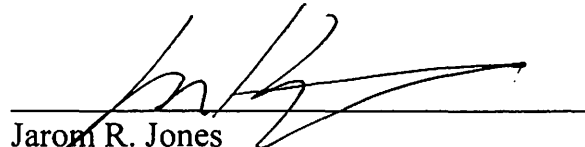


**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of March, 2017, I caused to be served, via U.S. Mail, First Class, two (2) true and correct copies of the foregoing **BRIEF OF PETITIONER**, together with an electronic Courtesy Brief in searchable PDF format, upon the following:

David M. Wilkins (14887)  
*Assistant Attorney General*  
OFFICE OF THE ATTORNEY GENERAL FOR UTAH  
Sean Reyes (7969)  
P.O. Box 140857  
160 East 300 South, 5<sup>th</sup> Fl.  
Salt Lake City, Utah 84114

BENNETT TUELLER JOHNSON & DEERE

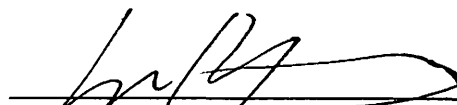
  
Jarom R. Jones  
Jeremy C. Reutzel

*Attorneys for Petitioner*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 4678 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B) and complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 13-point-font size.

BENNETT TUELLER JOHNSON & DEERE



Jarom R. Jones  
Jeremy C. Reutzel

*Attorneys for Petitioner*

## ADDENDUM

# EXHIBIT 1

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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**THE UTAH OCCUPATIONAL SAFETY  
AND HEALTH DIVISION,**

**Petitioner,**

**vs.**

**JOHN KUHNI & SONS, INC.,**

**Respondent.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 531093282**

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John Kuhni & Sons, Inc. ("Kuhni") asks the Utah Labor Commission to review Administrative Law Judge Trayner's decision upholding a citation issued by the Utah Occupational Safety and Health Division ("UOSH") for a workplace safety violation under R614-1-4(B)(1) of the Utah Administrative Code and §34A-6-201 of the Utah Occupational Safety and Health Act.

The Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-6-304 of the Utah Occupational Safety and Health Act.

**BACKGROUND AND ISSUES PRESENTED**

UOSH cited Kuhni for three safety violations and assessed Kuhni with a penalty of \$76,250. UOSH issued the citation and penalty to Kuhni on February 22, 2016, and the citation was delivered via Federal Express on February 25, 2016. UOSH received confirmation that an individual named "S. Ballow" signed for the package containing the citation. The citation informed Kuhni in bold and underlined type that it had 30 days to notify the Adjudication Division of intent to contest the citation and request a hearing.

Included in the description of Kuhni's appeal rights was the statement that failure to inform the Adjudication Division of intent to contest the citation within 30 days would make it a final order by the Commission not subject to review. On March 16, 2016, a UOSH compliance officer sent an email to Kuhni's management confirming that notice of the citation had been delivered and that it would become a final order if Kuhni did not contest the citation by March 26, 2016. Kuhni did not notify the Adjudication Division of its intent to contest the citation until June 6, 2016.

Kuhni's appeal of the citation was assigned to Judge Trayner. UOSH moved to dismiss Kuhni's appeal as untimely and Judge Trayner granted the motion over Kuhni's objection. Kuhni now seeks review of Judge Trayner's dismissal of its appeal by arguing that it did not receive proper notice of the citation and penalty because it was not delivered by the U.S. Postal Service. Kuhni also submits that its due process rights were violated in two ways: the notice of its appeal rights were not conspicuously presented in the citation; and its appeal was dismissed without a hearing.

DISCUSSION AND CONCLUSIONS OF LAW

Kuhni's motion for review consists of two main arguments regarding: 1) the requirements for providing notice of a citation; and 2) alleged violations of its due process rights. The Appeals Board addresses these arguments in turn, as follows.

I. Notice Requirements

Subsection 34A-6-303(1) of the Utah Occupational Safety and Health Act provides the following with regard to the procedure for notification and appeal of a citation:

- (a) If the division issues a citation under Subsection 34A-6-302(1), it shall within a reasonable time after inspection or investigation, notify the employer by certified mail of the assessment, if any, proposed to be assessed under Section 34A-6-307 and that the employer has 30 days to notify the Division of Adjudication that the employer intends to contest the citation, abatement, or proposed assessment.
- (b) If, within 30 days from the receipt of the notice issued by the division, the employer fails to notify the Division of Adjudication that the employer intends to contest the citation, abatement, or proposed assessment, and no notice is filed by any employee or representative of employees under Subsection (3) within 30 days, the citation, abatement, and assessment, as proposed, is final and not subject to review by any court or agency.

The Appeals Board notes that Kuhni does not dispute receiving notice of the citation when it was delivered on February 25, 2016. Kuhni argues such notice was insufficient to trigger the start of the 30-day period for contesting the citation because §303(1)(a) requires notice via "certified mail" by the U.S. Postal Service. This argument is not persuasive. Subsection 303(1)(a) does not specify that delivery of a citation must be performed by the U.S. Postal Service, only that it be via "certified mail" such that UOSII could ensure delivery by way of a return receipt.<sup>1</sup> Kuhni contends that the term "mail" necessarily implies delivery through the U.S. Postal Service, but cannot point to any Utah precedent<sup>2</sup> for such a narrow interpretation.

More important than parsing the term "certified mail" is the fact that Kuhni does not dispute receiving the citation when it was delivered on February 25, 2016. The fact that Kuhni actually received the citation means that the notice requirement was satisfied regardless of which third-party carrier delivered it. The Appeals Board agrees with Judge Trayner that UOSII complied with the requirements of §303(1)(a) in notifying Kuhni of the citation and starting the 30-day period for

---

<sup>1</sup> See *Black's Law Dictionary, Sixth Edition*, 1990.

<sup>2</sup> Kuhni cites a Michigan case in which the court interpreted the term "mail" to mean delivery by the U.S. Postal Service specifically. The Appeals Board is not convinced by such interpretation, which is not binding in this matter.

ORDER AFFIRMING ALJ'S DECISION  
JOHN KUHNI & SONS, INC.  
PAGE 3 OF 5

contesting it.

II. Due Process

Kuhni argues that its due process rights were violated because the notice of its appeal rights were not prominently or conspicuously presented with the citation and because Judge Trayner dismissed Kuhni's appeal without holding a hearing. Regarding the information pertaining to Kuhni's appeal rights, the instructions, deadline, and consequences for failure to respond were plainly outlined on pages three and four of the citation immediately following instructions on what to do as a result of the citation. Of note, the 30-day deadline and consequences for missing it were underlined and written in bold type.


Additionally, the record shows that Kuhni was informed of its appeal rights by a UOSH compliance officer separate from the written information included with the citation. Kuhni was even given a specific date by which it was required to contest the citation to be considered timely. After reviewing the evidence in this matter, the Appeals Board does not agree with Kuhni's characterization of its appeal rights as inconspicuous or otherwise unclear such that its due process rights were violated.

With respect to Kuhni's argument that Judge Trayner's dismissal was a violation of due process, Kuhni has not provided any authority to show that such dismissal based on a lack of jurisdiction was improper. Judge Trayner did not, as Kuhni asserts, convert UOSH's motion to dismiss into a motion for summary judgment. Judge Trayner's decision shows that she dismissed Kuhni's appeal after determining that the Adjudication Division did not have jurisdiction over the appeal due to Kuhni's failure to contest the citation within 30 days as instructed. Judge Trayner considered and addressed Kuhni's arguments submitted in response to UOSH's motion to dismiss; Kuhni therefore had the opportunity to argue its position. Based on the foregoing, the Appeals Board is not convinced that Kuhni's due process rights were violated. The Appeals Board agrees with Judge Trayner's decision to dismiss Kuhni's appeal for lack of jurisdiction.

ORDER

The Appeals Board affirms Judge Trayner's dismissal of Kuhni's appeal in her decision dated July 11, 2016. It is so ordered.

Dated this 26<sup>th</sup> day of October, 2016.

  
Patricia Lammi, Chair

  
Patricia S. Drawe

**ORDER AFFIRMING ALJ'S DECISION  
JOHN KUHN & SONS, INC.  
PAGE 4 OF 5**

**CONCURRENCE**

I concur with the above decision in all regards but write separately to add two concerns which I have and which were raised by the Respondent. First, the term "certified mail" is a legislatively created phrase. We have no reason, in the record, to believe that the legislature meant that only the U.S. Postal Service's certified mail can be used by UOSH. Since there is no dispute that the Respondent did, in fact, have actual notice of UOSH's citation, I am willing to accept the majority's argument on this point.

Second, the served Citation and Notice of Penalty is not written with clarity. I do believe the Citation was sufficiently clear to grant Respondent notice of what would happen unless the Respondent responded within 30 days; therefore, I am agreeing with the majority that the Respondent did have notice. However, UOSH might be well advised to re-write their form citation to avoid similar arguments to that of Respondent in the future.

  
\_\_\_\_\_  
Joseph E. Hatch

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.



ORDER AFFIRMING ALJ'S DECISION

Utah Occupational Safety and Health vs. John Kuhni Sons Inc

PAGE 5 OF 5

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Order Affirming ALJ's Decision, was mailed on October 26, 2016, to the persons/parties at the following addresses:

Utah Occupational Safety and Health  
160 E 300 S 3rd Fl  
Salt Lake City UT 84114

John Kuhni Sons Inc  
P O Box 15  
Nephi UT 84648

David M Wilkins  
dwilkins@utah.gov

Jeremy C Reutzell  
jreutzell@btjd.com

Chris Hill  
UOSH Division Director  
chill@utah.gov

UTAH LABOR COMMISSION

  
\_\_\_\_\_

# **EXHIBIT 2**



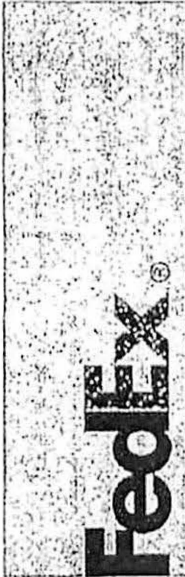
Lola Chacon <lchacon@utah.gov>

**FedEx Shipment 775716831577 Delivered**

1 message

trackingupdates@fedex.com <trackingupdates@fedex.com>  
Reply-To: trackingmail@fedex.com  
To: lchacon@utah.gov

Thu, Feb 25, 2016 at 11:59 AM



**Your package has been delivered**

Tracking # 775716831577

Ship date:  
Tue, 2/23/2016

Delivery date:  
Thu, 2/25/2016 11:54  
am

Lola Chacon  
UT. ST. LABOR COMMISSION  
UOSH  
SALT LAKE CITY, UT 84111  
US



Delivered

ATTN MR PAUL KUHN  
JOHN KUHN SONS INC  
6480 W MILLS RD  
LEVAN, UT 84639  
US

**Shipment Facts**

Our records indicate that the following package has been delivered.

<b>Tracking number:</b>	775716831577
<b>Status:</b>	Delivered: 02/25/2016 11:54 AM Signed for By: S.BALLOW
<b>Reference:</b>	1093282 V0
<b>Signed for by:</b>	S.BALLOW
<b>Delivery location:</b>	LEVAN, UT
<b>Delivered to:</b>	Receptionist/Front Desk
<b>Service type:</b>	FedEx 2Day
<b>Packaging type:</b>	FedEx Envelope
<b>Number of pieces:</b>	1
<b>Weight:</b>	0.50 lb.
<b>Special handling/Services:</b>	Direct Signature Required  Deliver Weekday

Please do not respond to this message. This email was sent from an unattended mailbox. This report was generated at approximately 12:58 PM CST on 02/25/2016.

To learn more about FedEx Express, please go to fedex.com.

All weights are estimated.

To track the latest status of your shipment, click on the tracking number above, or go to fedex.com.

This tracking update has been sent to you by FedEx at your request. FedEx does not validate the authenticity of the requestor and does not validate, guarantee or warrant the authenticity of the request, the requestor's message, or the accuracy of this tracking update. For tracking results and terms of use, go to fedex.com.

Thank you for your business.

110021

SHIP DATE 23FEB16  
 BILL SENDER  
 CHACON  
 ST LABOR COMMISSION USCH  
 160 E 300 SO 3RD FL  
 SALT LAKE CITY UT 84111  
 UNITED STATES US

TO  
 ATTN MR PAUL KUHNII  
 JOHN KUHNII SONS INC  
 6480 W MILLS RD  
 LEVAN UT 84639  
 (435) 758-7800  
 NV

SHIP DATE 23FEB16  
 BILL SENDER  
 CHACON  
 ST LABOR COMMISSION USCH  
 160 E 300 SO 3RD FL  
 SALT LAKE CITY UT 84111  
 UNITED STATES US

THU - 25 FEB 4:30P  
 \*\* 2DAY \*\*  
 DSR  
 84639  
 UT-US SLC

TRK# 7757 1683 1577

SH VELA




After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

**Warning** Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

State of Utah Labor Commission  
Utah Occupational Safety and Health (UOSH)  
160 East 300 South  
P.O. Box 146650  
Salt Lake City, UT 84114  
Phone: (801) 530-6901 Fax: (801) 530-7606  
www.laborcommission.utah.gov



## Citation and Notification of Penalty

To:  
JOHN KUHNI SONS, INC.  
and its successors  
P.O. BOX 15 Nephi, UT 84648

Inspection Number: 1093282  
Inspection Date (s): 09/21/2015-02/03/2016  
Issuance Date: 02/22/2016

Inspection Site:  
6480 W MILLS RD  
Levan, UT 84639

*The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.*

### EMPLOYER MUST COMPLY WITH THE FOLLOWING CITATION REQUIREMENTS

This Citation and Notification of Penalty (Citation) contains important information about employers' and employees' rights and responsibilities. The Citation describes alleged violation(s) of the Utah Occupational Safety and Health Act of 1973 (the Act). This violation(s) described in this Citation is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description of each violation. You must abate the violation(s) referenced in this Citation by the dates listed. The proposed penalty(ies) is (are) due within 30 calendar days of receipt of this Citation, unless formally contested or payment arrangements are made with the Utah Division of Occupational Safety and Health (UOSH). You have the right to contest this Citation. For more information, please refer to the "Right to Contest" section of this Citation. Issuance of this Citation does not constitute a finding that a violation of the Act has occurred, unless this Citation becomes a final order as provided by Utah Code Annotated (UCA) §34A-6-303(1)(b).

### REQUIREMENT TO POST THE CITATION

The Utah Administrative Code (UAC) R614-1-7.Q.1 requires that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for three working days (excluding weekends and holidays), whichever is longer.

### REQUIREMENT TO FILE A CERTIFICATION OF ABATEMENT

Notification of Corrective Action – For each violation, which you do not formally contest, you must notify UOSH in writing, within 5 calendar days of the abatement date indicated on the Citation, of the date(s) and corrective action(s) taken. For **Willful, Repeat, Failure to Abate, and Serious** violations and any **significant event** for which UOSH indicates, documents demonstrating that abatement is complete must accompany the certification (for example: photos, copies of receipts, training records, etc.). Where the Citation is classified as **Other-than-Serious**, and the Citation states that abatement documentation is required, documents such as those described above are required to be submitted along

with abatement certification. If the Citation indicates that the violation was corrected during the inspection, no certification of abatement is required for that item.

**All abatement verification documents must contain the following information:** 1) Establishment name and site address; 2) the inspection number 1093282; 3) the Citation and Citation item number(s) to which the submission relates; 4) a statement that the information is accurate; 5) the printed name and signature of the employer or employer's authorized representative; 6) the date the hazard was corrected; 7) a brief statement of how the hazard was corrected; and 8) a statement that affected employees and their representatives have been informed of the abatement.

You must complete, sign, and submit the Certification of Abatement and any additional documentation to UOSH at the following address:

**Utah Occupational Safety and Health  
Attention: Compliance Section  
160 East 300 South, 3rd floor  
P.O. Box 146650  
Salt Lake City, UT 84114-6650**

The employer must inform affected employees and their representative(s) about abatement activities covered by this section by posting a copy of each document submitted to UOSH, or a summary of the document near the place where the violation occurred.

#### **PAYMENT OF PENALTY**

You must pay the penalty(ies) on the "Notification of Assessed Penalty" within 30 calendar days from the receipt of this Citation, unless you inform the Utah Labor Commission Adjudication Division (Adjudication Division) in writing that you intend to contest the Citation. If you do not contest within 30 calendar days after receipt, the Citation will become the final order of the Utah Labor Commission and may not be reviewed by any court or agency.

Please make your check or money order payable to "Utah Occupational Safety and Health". Indicate the inspection number 1093282 on the remittance. UOSH does not agree to any restrictions or conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

#### **FOLLOW-UP INSPECTIONS**

A follow-up inspection may be conducted to verify that you have posted the Citation as required and/or corrected the violation(s). You have the continuing responsibility to comply with the Act. Any new violation(s) discovered during a follow-up inspection will be cited. In order to achieve abatement by the date set forth in the Citation(s), abatement efforts must be promptly initiated. Providing false information on your efforts to abate is punishable under UCA §34A-6-307(5)(c).

#### **EMPLOYER RETALIATION AGAINST WORKERS IS UNLAWFUL**

The law prohibits discrimination/retaliation by an employer against an employee for filing a complaint or for exercising any rights under the Act. An employee who believes that he/she has been discriminated against may file a complaint with UOSH and with the U.S. Department of Labor Region VIII Office no later than 30 days after the discrimination occurred.

#### **TYPES OF VIOLATIONS**

**WILLFUL** – A violation where either: 1) The employer committed an intentional and knowing violation of the Act; or, 2) though the employer was not intentionally violating the Act, he or she was aware that hazardous condition(s) existed and acted in careless disregard of employer responsibilities under the Act.

**SERIOUS** – A violation from a condition, practice, method, operation, or process in the workplace of which the employer knows or should know through the exercise of reasonable diligence; and there is a substantial possibility that the condition, practice, method, operation, or process could result in death or serious physical harm.

**OTHER-THAN-SERIOUS** – A violation from a hazardous condition which would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

**REPEAT** – A violation of the UOSH Rules/Standards for which an employer has been cited previously for the same or a substantially similar condition or hazard, by UOSH, and the Citation has become a final order of the Utah Labor Commission.

### **NOTICE TO EMPLOYEES**

UAC R614-1-7.R.2 gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The notice to contest must be received by the Adjudication Division, using one of the methods listed in the "Right to Contest" section of this Citation, within 30 days of receipt of this Citation by the employer.

### **INSPECTION ACTIVITY DATA**

You should be aware that OSHA publishes information on UOSH's inspections and Citation activity on the internet under the provision of the Electronic Freedom of Information Act. The information related to your inspection will be available after the Citation is issued. You are encouraged to review the information concerning your establishment at [www.osha.gov](http://www.osha.gov). If you have any disputes with the accuracy of the information displayed, please contact the UOSH office.

### **PETITION FOR MODIFICATION OF ABATEMENT**

Abatement dates are assigned on the basis of the best available information at the time the Citation is issued. When you are unable to meet an abatement date because of uncontrollable events or other circumstances, you may file a Petition for Modification of Abatement (PMA) with the UOSH Director. A PMA must be in writing and received by UOSH no later than the next working day following the abatement due date in accordance with UAC R614-1-7.O. The PMA must include all of the following information:

1. Steps you have taken so far in an effort to achieve compliance and dates of those steps.
2. Additional time period you need to comply.
3. The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.
4. Interim steps you are taking to safeguard you employees against the cited hazard during the abatement period.
5. A statement certifying that the petition for extension has been posted and, if appropriate, served on an authorized representative of the affected employees. The petition must be posted for 10 days, during which your employees may file an objection.

### **INFORMAL CONFERENCE**

**An informal conference is not required;** however, if you wish to have such a conference you may request one with UOSH at (801) 530-6901 during the 30-calendar day contest period. During such an informal conference, you may present any evidence or views, which you believe, would support an adjustment to the Citation(s) and/or penalty(ies).

If you decide to request an informal conference to discuss any issues related to the Citation, you must schedule it early enough to comply with the abatement due date(s). If you are unable to schedule an informal conference before the abatement due date(s) you must request a PMA. You must complete and post the "Notice to Employees of Informal Conference" next to this Citation as soon as the time, date, and place of the informal conference have been determined. Bring to the informal conference any and all supporting documentation of existing conditions, as well as, any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement, which will resolve this matter without litigation or formal contest. This contest period is not interrupted by an informal conference.

### **THE RIGHT TO CONTEST THIS CITATION**

In accordance with UCA §34A-6-303, you have the right to contest all or any part of this Citation by filing a written notice of contest with the Utah Labor Commission Adjudication Division (Adjudication Division) within 30 calendar days of receipt of this Citation as follows:

1. Mail notice of contest to the Adjudication Division, P.O. Box 146615, Salt Lake City, UT 84114-6615; or
2. Deliver notice of contest to Adjudication Division located in the Heber Wells Building, 160 East 300 South, 3rd floor, Salt Lake City, Utah; or
3. Electronically submit notice of contest to the Adjudication Division via email at [casefiling@utah.gov](mailto:casefiling@utah.gov); or

4. Fax notice of contest to the Adjudication Division at (801) 530-6333.

If a notice of contest is received, the Utah Labor Commission will then provide an adjudicative hearing. For further guidance, please telephone the Adjudication Division at (801) 530-6800. Unless you inform the Adjudication Division in writing that you intend to contest the Citation(s) within 30 calendar days after receipt, the Citation(s) will become a final order of the Utah Labor Commission and may not be reviewed by any court or agency.

**THE CITATION ADJUDICATION PROCESS**

If the notice of contest has been filed within the 30 calendar days with the Adjudication Division, the case will be assigned to an administrative law judge and a hearing will be scheduled. Employer and employees may participate in the hearing. If the employer is a corporate entity, they must be represented by an attorney. Only an unincorporated individual can represent themselves at a formal adjudication hearing.

The hearing will involve all the elements of a trial, including examination and cross-examination of witnesses. The administrative law judge may affirm, modify, or eliminate any contested item of the Citation. Once the administrative law judge has ruled, any party to the case may request a further review by the Utah Labor Commission. The ruling of the Commission may be appealed to the Utah Court of Appeals. For more information regarding the adjudication process, please contact the Adjudication Division at (801) 530-6800 or visit its website at: <http://laborecommission.utah.gov/divisions/Adjudication/index.html>.

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State of Utah Labor Commission  
Utah Occupational Safety and Health (UOSH)  
160 East 300 South  
P.O. Box 146650  
Salt Lake City, UT 84114  
Phone: (801) 530-6901 Fax: (801) 530-7606  
www.laborcommission.utah.gov



## NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

Your employer has scheduled an informal conference with Utah Occupational Safety and Health (UOSH) to discuss the Citation(s) issued on 02/22/2016, for workplace safety and health violations, Inspection Number 1093282. The informal conference will be held at the UOSH office located at 160 East 300 South, Salt Lake City, UT 84111-6650 on (date) at (time)

Employees and/or representatives of employees have a right to attend this informal conference.

1093282

State of Utah Labor Commission  
Utah Occupational Safety and Health (UOSH)  
160 East 300 South  
P.O. Box 146650  
Salt Lake City, UT 84114  
Phone: (801) 530-6901 Fax: (801) 530-7606  
www.laborcommission.utah.gov



### Citation and Notification of Penalty

**Company Name:** JOHN KUHNI SONS, INC.  
**Inspection Site:** 6480 W MILLS RD Levan, UT 84639  
**Inspection Number:** 1093282  
**Inspection Dates:** 09/21/2015-02/03/2016  
**Issuance Date:** 02/22/2016  
**CSHO ID:** V0813

Citation 1 Item 1 Type of Violation: **Willful-Serious**

UAC R614-5-2.A.4: "Screw conveyors, troughs, or box openings shall have covers, grating or guard rails to prevent workers from coming in contact with the moving conveyor."

(A) Screw conveyors, troughs, and/or box openings did not have covers, grating or guardrails as required.

a. The covers (guards) for sections "A" and "B" of the Pressor Discharge Screw Conveyor were off during the production of "cake" material on September 18, 2015, the day of the accident.

b. On September 18, 2015, employee (5) straddled the uncovered (unguarded) section "A" of the Pressor Discharge Screw Conveyor while attempting to unclog the Pressor Discharge Chute, when he slipped or lost balance, and his legs were pulled into the screw conveyor that resulted in the amputation of his lower legs.

c. John Kuhni Sons, Inc. Plant Manager (PM) of Production and Cooking Operations knew the covers (guards) for sections "A" and "B" of the Pressor Discharge Screw Conveyor had not been on at least since February 2014 and took no corrective action to have the guards installed on sections "A" and "B" of the Pressor Discharge Screw Conveyor.

d. John Kuhni Sons, Inc. Maintenance Supervisor/Engineer and the HR/Safety and Compliance Supervisor had observed that the covers (guards) on sections "A" and "B" of the Pressor Discharge Screw Conveyor had been removed during their walkthroughs of the Cooking Room but did not follow up with the Plant Manager (PM) of Production and Cooking Operations to insure the covers (guards) were reinstalled but continued to allow employees to be exposed to this violative condition.

e. The main entryway through the Cooking Room runs alongside and between the Pressor Discharge Screw Conveyor and the Cooking Control room. Unguarded Sections "A" and "B" of the Pressor Discharge Screw Conveyor were in plain view to those using the entryway through the Cooking Room and to those who were in the Control Room. The Control Room has Plexiglas windows all along the side facing the Cooker, the Pressor and the Pressor Discharge Screw Conveyor.

f. John Kuhni Sons, Inc. Plant Manager of Production and Cooking Operations saw the Maintenance Supervisor/Engineer walk through the Cooking Room alongside the Pressor Discharge Screw Conveyor and the covers (guards) for sections "A" and "B" were off.

g. Prior to the company hiring employees (9) and (10) as cookers, the Plant Manager (PM) of Production and Cooking Operations would run the cooking process and the co-owner (employee (2)) would load the tankers with grease and come into the Cooking Control Room every work day passing by the Pressor Discharge Screw Conveyor where sections "A" and "B" were left unguarded and were in plain view.

h. John Kuhni Sons, Inc. Co-owner (employee (2)), Plant Manager (PM) of Production and Cooking Operations, Maintenance Supervisor/Engineer and the HR/Safety and Compliance Supervisor committed a willful violation by demonstrating plain indifference to the violative condition. Said employer intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the unguarded sections "A" and "B" of the Pressor Discharge Screw Conveyor that were in plain view that had existed at least since February 2014, that resulted in serious injuries to employee (5).

**Date By Which Violation Must be Abated:  
Proposed Penalty:**

**Corrected During Inspection  
\$35,000.00**

Citation Item 2 Type of Violation: **Willful-Serious**

UAC R614-5-2.1.4: "No safety device, guard, overload, cutout, brake, etc., shall be removed from a conveyor and the conveyor placed in operation without the device being reinstalled. Where permanent guards at hazardous points must be left off, the area shall be laced off with temporary boards, etc., if the conveyor is placed in operation other than for testing."

(A) Safety device, guard, overload, cutout, brake, etc., was removed from a conveyor and the conveyor placed in operation without the device being reinstalled.

a. On September 18, 2015, the Pressor and Pressor Discharge Screw Conveyor were operated without guards (covers) on sections "A" and "B" of the conveyor while employees were processing "cake" material.

b. On September 18, 2015, employee (5) straddled the uncovered (unguarded) section "A" of the Pressor Discharge Screw Conveyor while attempting to unclog the Pressor Discharge Chute, when he slipped or lost balance, and his legs were pulled into the screw conveyor that resulted in the amputation of his lower legs.

c. Employees (6) and (7) stated during interviews that guards (Sections "A" & "B") had been removed from the Pressor Discharge Screw Conveyor for at least 20 months from the date of the accident, where an employee's legs were pulled into the conveyor resulting in the amputation of his lower legs on September 18, 2015.

d. John Kuhni Sons, Inc. Plant Manager (PM) of Production and Cooking Operations knew the covers (guards) for sections "A" and "B" of the Pressor Discharge Screw Conveyor had not been on at least since February 2014 and took no corrective action to have the guards installed on sections "A" and "B" of the Pressor Discharge Screw Conveyor.

e. John Kuhni Sons, Inc. Maintenance Supervisor/Engineer and the HR/Safety and Compliance Supervisor had observed that the covers (guards) on sections "A" and "B" of the Pressor Discharge Screw Conveyor had been removed during their walkthroughs of the Cooking Room but did not follow up with the Plant Manager (PM) of Production and Cooking Operations to insure the covers (guards) were reinstalled but continued to allow employees to be exposed to this violative condition.

f. The main entryway through the Cooking Room runs alongside and between the Pressor Discharge Screw Conveyor and the Cooking Control room. Unguarded Sections "A" and "B" of the Pressor Discharge Screw Conveyor were in plain view to those using the entryway through the Cooking Room and to those who were in the Control Room. The Control Room has Plexiglas windows all along the side facing the Cooker, the Pressor and the Pressor Discharge Screw Conveyor.

g. John Kuhni Sons, Inc. Plant Manager of Production and Cooking Operations saw the Maintenance Supervisor/Engineer walk through the Cooking Room alongside the Pressor Discharge Screw Conveyor and the covers (guards) for sections "A" and "B" were off.

h. Prior to the company hiring employees (9) and (10) as cookers, the Plant Manager (PM) of Production and Cooking Operations would run the cooking process and the co-owner (employee (2)) would load the tankers with grease and come into the Cooking Control Room every work day passing by the Pressor Discharge Screw Conveyor where sections "A" and "B" were left unguarded and were in plain view.

i. John Kuhni Sons, Inc. Co-owner (employee (2)), Plant Manager (PM) of Production and Cooking Operations, Maintenance Supervisor/Engineer and the HR/Safety and Compliance Supervisor committed a willful violation by demonstrating plain indifference to the violative condition. Said employer intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the unguarded sections "A" and "B" of the Pressor Discharge Screw Conveyor that were in plain view that had existed at least since February 2014, that resulted in serious injuries to employee (5).

**Date By Which Violation Must be Abated:  
Proposed Penalty:**

**Corrected During Inspection  
\$35,000.00**

Citation 2 Item 1 Type of Violation: **Serious**

UAC R614-5-2.B.1: "Periodic inspection of the entire conveying mechanism shall be made for worn parts, defective couplings, loose belts, chains and defective safety devices such as brakes, backstops, overload releases, guards, etc."

(A) Periodic inspections of the entire conveying mechanism and for defective safety devices were not made as required.

a. The Maintenance Supervisor/Engineer stated that preventative maintenance is done every week on the screw assemblies. Belts are checked on the drive motors, gearboxes are oiled and greased, the bearings on the ends of each screw are greased weekly, and some are done daily. Bolts are checked on the screws.

b. Employees (6) and (7) performed preventative maintenance on the Pressor Discharge Screw Conveyor but did not inspect for defective safety devices, the guards on sections "A" and "B" that were missing.

c. Employees (6) and (7) stated during interviews that guards (Sections "A" & "B") had been removed from the Pressor Discharge Screw Conveyor for at least 20 months from the date of the accident, where an employee's legs were pulled into the conveyor resulting in the amputation of his lower legs on September 18, 2015.

d. John Kuhn Sons, Inc. Plant Manager of Production and Cooking Operations saw the Maintenance Supervisor/Engineer walk through the Cooking Room alongside the Pressor Discharge Screw Conveyor and the covers (guards) for sections "A" and "B" were off.

e. Prior to the company hiring employees (9) and (10) as cookers, the Plant Manager (PM) of Production and Cooking Operations would run the cooking process and the co-owner (employee (2)) would load the tankers with grease and come into the Cooking Control Room every work day passing by the Pressor Discharge Screw Conveyor where sections "A" and "B" were left unguarded and were in plain view.

f. John Kuhn Sons, Inc. Maintenance Supervisor/Engineer and the HR/Safety and Compliance Supervisor had observed that the covers (guards) on sections "A" and "B" of the Pressor Discharge Screw Conveyor had been removed during their walkthroughs of the Cooking Room but did not follow up with the Plant Manager (PM) of Production and Cooking Operations to insure the covers (guards) were reinstalled but continued to allow employees to be exposed to this violative condition.

**Date By Which Violation Must be Abated:**  
**Proposed Penalty:**

**March 08, 2016**  
**\$3,000.00**

**CERTIFICATION OF ABATEMENT:**

The violation identified above was corrected on \_\_\_\_\_ by \_\_\_\_\_

Actions Taken: \_\_\_\_\_

I attest that I am an authorized representative of the employer and that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

By providing abatement verification to UOSH, and signing this document, the employer does not admit that it violated the cited standards for any litigation or purpose other than subsequent proceeding under the Utah Occupational Safety and Health Act.

Signature

Date

Typed or Printed Name

Citation 2 Item 2 a Type of Violation: **Serious**

29 CFR 1910.1200(e)(1): "Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:

- (i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,
- (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas."

(A) The employer did not develop, implement, and maintain at the workplace a written hazard communication program as required.

The employer did not have a written hazard communication program.

Employees that work in the Cooking Room clean the equipment and walking/working surfaces with hot water using a pressure spray washer and/or a wire-braided hose tied into the boiler system where steam is mixed with water to clean the equipment.

The employees clean the Cooking Control Room approximately every two weeks with hot water, spreads some trisodium phosphate (TSP) on the floor and use a broom to clean the floor. The floor is then washed again with hot water. The Plant Manager over Cooking and Production Operations has had he and his employees use a cup of TSP in a five-gallon bucket of water and inject it into the pressurized spray washer. A 1% solution of TSP has a pH between 11-12. The TSP in the five-gallons of water is approximately 0.18 % solution of TSP, an approximate pH between 10-11.

**Date By Which Violation Must be Abated:**  
**Proposed Penalty:**

**March 23, 2016**  
**\$2,500.00**

**CERTIFICATION OF ABATEMENT:**

The violation identified above was corrected on \_\_\_\_\_ by \_\_\_\_\_

Actions Taken: \_\_\_\_\_

I attest that I am an authorized representative of the employer and that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

By providing abatement verification to UOSH, and signing this document, the employer does not admit that it violated the cited standards for any litigation or purpose other than subsequent proceeding under the Utah Occupational Safety and Health Act.

Signature

Date

Typed or Printed Name

Citation 2 Item 2 b Type of Violation: **Serious**

29 CFR 1910.1200(h)(1): "Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets."

(A) The employer did not provide employees with effective information and training on hazardous chemicals in their work area as required.

The employer did not provide effective information and training to their employees on the physical and health hazards of the chemicals they work with or could encounter in the workplace.

Employees occasionally work a .18% solution of trisodium phosphate to clean the Cooking Room and Control Room floor. It has an ~ pH of 10-11. Splashing liquid or getting solid material on skin could cause damage to skin/eyes.

<b>Date By Which Violation Must be Abated:</b>	<b>March 23, 2016</b>
<b>Proposed Penalty:</b>	<b>\$0.00</b>

**CERTIFICATION OF ABATEMENT:**

The violation identified above was corrected on \_\_\_\_\_ by \_\_\_\_\_

Actions Taken: \_\_\_\_\_  
\_\_\_\_\_

I attest that I am an authorized representative of the employer and that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

By providing abatement verification to UOSH, and signing this document, the employer does not admit that it violated the cited standards for any litigation or purpose other than subsequent proceeding under the Utah Occupational Safety and Health Act.

Signature \_\_\_\_\_ Date \_\_\_\_\_

Typed or Printed Name \_\_\_\_\_

Citation 3 Item 1 Type of Violation: **Other-than-Serious**

UAC R614-1-5.C.1: "Each employer shall within 8 hours of occurrence, notify the Division of Utah Occupational Safety and Health of the Commission of any work-related fatalities, of any disabling, serious, or significant injury and of any occupational disease incident. Call (801) 530-6901."

(A) Each employer did not notify the Division of Utah Occupational Safety and Health as required.

The employer did not notify the Utah Occupational Safety and Health Division (UOSH) within 8 hours of the occurrence of the injury that occurred on September 18, 2015 at approximately 5:00 p.m. The employer reported the incident to Federal OSHA on September 19, 2015 at approximately 4:00 p.m. UOSH contacted the employer on September 21, 2015 at approximately 7:52 a.m.

**Date By Which Violation Must be Abated:  
Proposed Penalty:**

**Corrected During Inspection  
\$500.00**

**CERTIFICATION OF ABATEMENT:**

The violation identified above was corrected on \_\_\_\_\_ by \_\_\_\_\_

Actions Taken: \_\_\_\_\_

I attest that I am an authorized representative of the employer and that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

By providing abatement verification to UOSH, and signing this document, the employer does not admit that it violated the cited standards for any litigation or purpose other than subsequent proceeding under the Utah Occupational Safety and Health Act.

Signature

Date

Typed or Printed Name

00064



Citation 3 Item 2. Type of Violation: **Other-than-Serious**

29 CFR 1904.40(a): "Basic requirement. When an authorized government representative asks for the records you keep under Part 1904, you must provide copies of the records within four (4) business hours."

(A) Copies of the records kept under Part 1904 were not provided to an authorized government representative as required.

The employer did not provide UOSH OSHA 300 & 300A logs within the specified time requirement. Requested OSHA 300 & 300A logs on September 22, 2015. As of January 19, 2016, OSHA Logs had not been received.

Recordable Injuries from five years from September 18, 2015 are as follows:

Date of Injury	Case ID	Nature of Injury	Medical Treatment
10/30/2010	3180709	Laceration Left Hand	Yes
07/08/2011	3286816	Strain	Yes
11/20/2014	3679127	Fracture, Foot	Yes
09/18/2015	3926633	Amputation, Legs	Yes

**Date By Which Violation Must be Abated:** **February 27, 2016**  
**Proposed Penalty:** **\$250.00**

**CERTIFICATION OF ABATEMENT:**

The violation identified above was corrected on \_\_\_\_\_ by \_\_\_\_\_

Actions Taken: \_\_\_\_\_

I attest that I am an authorized representative of the employer and that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

By providing abatement verification to UOSH, and signing this document, the employer does not admit that it violated the cited standards for any litigation or purpose other than subsequent proceeding under the Utah Occupational Safety and Health Act.

Signature \_\_\_\_\_

Date \_\_\_\_\_

Typed or Printed Name \_\_\_\_\_

00055

**Citation 3 Item 3 Type of Violation: Other-than-Serious**

29 CFR 1910.132(d)(2): "The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment."

(A) The employer did not verify that the required workplace hazard assessment was performed through a written certification as required.

The employer did not verify through a written certification that a PPE hazard assessment had been performed.

**Date By Which Violation Must be Abated:** February 27, 2016  
**Proposed Penalty:** \$0.00

**CERTIFICATION OF ABATEMENT:**

The violation identified above was corrected on \_\_\_\_\_ by \_\_\_\_\_

Actions Taken:

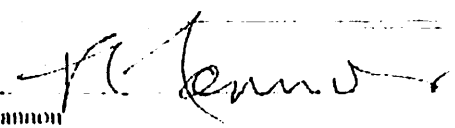
I attest that I am an authorized representative of the employer and that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

By providing abatement verification to UOSH, and signing this document, the employer does not admit that it violated the cited standards for any litigation or purpose other than subsequent proceeding under the Utah Occupational Safety and Health Act.

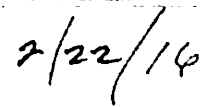
Signature

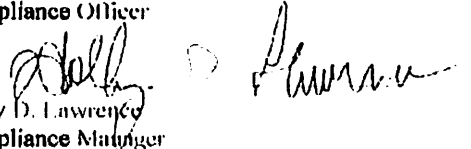
Date

Typed or Printed Name

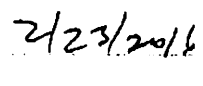


Paul Cannon  
Compliance Officer

  
Date



Holly D. Lawrence  
Compliance Manager

  
Date

State of Utah Labor Commission  
 Utah Occupational Safety and Health (UOSH)  
 160 East 300 South  
 P.O. Box 146650  
 Salt Lake City, UT 84114  
 Phone: (801) 530-6901 Fax: (801) 530-7606  
[www.laborcommission.utah.gov](http://www.laborcommission.utah.gov)



## NOTIFICATION OF ASSESSED PENALTY

**Company Name:** JOHN KUHNI SONS, INC.  
**Inspection Site:** 6480 W MILLS RD Levan, UT 84639  
**Issuance Date:** 02/22/2016  
**Summary of Penalties for Inspection Number:** 1093282

Citation 1 Item 1, Willful-Serious	\$35,000.00
Citation 1 Item 2, Willful-Serious	\$35,000.00
Citation 2 Item 1, Serious	\$3,000.00
Citation 2 Item 2a, Serious	\$2,500.00
Citation 2 Item 2b, Serious	\$0.00
Citation 3 Item 1, Other-than-Serious	\$500.00
Citation 3 Item 2, Other-than-Serious	\$250.00
Citation 3 Item 3, Other-than-Serious	\$0.00
<b>TOTAL PROPOSED PENALTIES:</b>	<b>\$76,250.00</b>

The total proposed penalty is due within 30 calendar days of receipt of this Citation unless formally contested or payment arrangements are made with UOSH.

To avoid additional charges, please remit payment promptly to this Office (UOSH) for the total amount of the uncontested penalties summarized above. Make your check or money order payable to:

Utah Occupational Safety and Health  
 Attention: Compliance Department  
 160 East 300 South, 3rd Floor  
 P.O. Box 146650  
 Salt Lake City, Utah 84114-6650

Please indicate the UOSH Inspection Number: **1093282** on the remittance.

UOSH does not agree to any restrictions or conditions or endorsements put on any check or money order for less than full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

In accordance with Utah State policy, penalties not collected will be turned over to the Utah Office of State Debt Collection (OSDC). The OSDC may assess interest, delinquent charges, and administrative costs for the collection of delinquent penalty debts for violations of the Utah Occupational Safety and Health Act.

  
 Holly D. Lawrence  
 Compliance Manager

Date 2/23/2016