

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

In the Matter of the Appeal of:

**AMERICAN FUMIGATION SERVICES, LLC.
750 S. Lugo Avenue
San Bernardino, CA 92408**

Employer

Inspection No.
1506586

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, hereby denies the petition for reconsideration filed by Division of Occupational Safety and Health (Division).

JURISDICTION

On May 10, 2021, the Division of Occupational Safety and Health (Division) issued two citations to American Fumigation Services, LLC. (Employer). In Citation 1, Item 1, the Division alleged a General violation of section 3395, subdivision (d)¹ [failure to provide a shaded cooling area for employees working outdoors in temperatures exceeding 80 degrees Fahrenheit], with a proposed penalty of \$465. In Citation 2, Item 1, the Division alleged a Serious violation of section 3210, subdivision (c) [failure to ensure alternative means of fall protection where guardrails were impracticable], with a proposed penalty of \$13,500.

On May 21, 2021, Employer initiated its appeal by telephone. The administrative record does not specify whether Employer referred to one or both citations during that call.

On June 23, 2021, the Board issued Employer a Notice of Incomplete Appeal. In response, on July 16, 2021, Employer submitted an Appeal Form that identified Citation 1, Item 1, but failed to include a separate Appeal Form that identified Citation 2, Item 1.

Employer subsequently obtained representation who recognized the error in Employer's Appeal Form and promptly filed a Motion for Leave to File Late Appeal (Motion). Regarding Employer's Motion, counsel for the Division stated, "The Division will not object to the motion and will defer to the Board's decision as to whether there is good cause to file the late appeal." (Petition, Exh. 1.)

On August 26, 2022, Administrative Law Judge (ALJ) Howard Chernin issued an Order (Order) granting Employer's Motion.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

On September 30, 2022, despite not opposing Employer’s Motion, the Division filed the instant Petition for Reconsideration, challenging ALJ Chernin’s Order granting the amendment.

ISSUE

1) Should the Board grant the Division’s interlocutory petition for reconsideration?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case, including the arguments presented in the Petition. We have taken no new evidence. We conclude the Petition must be denied as interlocutory.

The Division’s Petition challenges the ALJ’s Order granting Employer’s requested amendment to Citation 2, Item 1. The ALJ’s Order granting the amendment to Citation 2 is interlocutory in nature. “An *interlocutory order* is one issued by a tribunal before a final determination of the rights of the parties to the action has occurred. ‘In determining whether a judgment is final or merely *interlocutory*, the rule is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is *interlocutory* only[.]’” (*Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sept. 17, 2014) [emphasis in original], citing *Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013).) Generally, Board precedent supports denial of petitions for reconsideration of interlocutory orders, “reasoning that they are not ‘final’ orders with the meaning of... Labor Code section 6614.” (*Ibid.*)

The Division argues that its Petition is not interlocutory because it “ultimately speaks to a final determination of the rights of the parties.” (Petition, p. 3.) Specifically, the Division argues that the Order is a “final order” because “a denial of said motion would, by operation of law, deem the citation a final order of the Board under Labor Code section 6601.” (*Id.*) We disagree. As the Board held in *A.L.L. Roofing & Building Materials Corporation*, Cal/OSHA App. 92-290 Denial of Petition for Reconsideration (Dec 2. 1992), a petition for reconsideration regarding a motion to amend “seeks an interlocutory determination of the administrative law judge.” Moreover,

The Board has long held that a petition for reconsideration may not be filed challenging a judge’s ruling on such matters until the hearing is concluded and the administrative law judge issues a final decision.

[...]

In the present case, Employer must wait until completion of the hearing and issuance of a decision to raise any appropriate issues for reconsideration under Labor Code Section 6617. Thus, its petition is premature and must be denied. (*Id.*)

We conclude that the Division’s petition concerns an interlocutory order. The Division’s argument that the Order is tantamount to a “final order” is not persuasive. Unlike the Order at issue here, an order *denying* leave to file a late appeal is a “final order,” specifically because it terminates that appeal and determines the final result of the matter, with nothing further required to affirm the citation. (*Fedex Ground, supra*, Cal/OSHA App. 13-1220.) However, as the Order notes, the “mere filing of an appeal does not conclusively establish or disprove Employer’s culpability, but merely provides the parties a forum for resolving their differences.” (Order, p. 1.) Thus, the Division’s hypothetical—that no judicial action would be required if ALJ Chernin had denied Employer’s Motion—is ultimately irrelevant here, since judicial action remains necessary for a final determination as to Employer’s liability.

The Division also argues that the Board should grant interlocutory review to address the legal question of whether the Board has jurisdiction to adjudicate this appeal. (Petition, pp. 3-5.) As the Division notes, the Board has recognized that review of interlocutory orders is permitted in some circumstances, “such as those involving questions of law” (*Fedex Ground, supra*, Cal/OSHA App. 13-1220.) However, while that precedent may *permit* the Board to grant interlocutory review, doing so remains squarely within the Board’s discretion. The Board reiterates that “[t]he grant of interlocutory review is ‘extraordinary,’ and ‘only exercised sparingly.’” (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1080515, Decision After Reconsideration (Nov. 24, 2020) [internal citations omitted].)

While the Petition raises “questions of law,” the Petition does not raise any novel legal issues that the Board’s regulations and precedent have not already addressed. (See *A.L.L. Roofing & Building Materials Corporation, supra*, Cal/OSHA App. 92-290; *Fedex Ground, supra*, Cal/OSHA App. 13-1220.)

DECISION

For the reasons stated above, the Petition is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Judith S. Freyman, Board Member

/s/ Marvin P. Kropke, Board Member

FILED ON: 08/26/2022

