BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1465354**
NATURAL ALTERNATIVES INTERNATIONAL, INC. **1535 FARADAY AVENUE** **CARLSBAD, CA 92008** **Employer**	**DECISION**

Statement of the Case

On August 26, 2020, the Division of Occupational Safety and Health (the Division) issued three citations to Natural Alternatives International, Inc. (Employer), alleging three violations of California Code of Regulations, title 8.[1]

Employer appealed two of the three citations, specifically, Citation 2, Item 1, and Citation 3, Item 1. Citation 2, Item 1, alleges Employer failed to follow its lockout tagout procedures. Citation 3, Item 1, alleges failure to provide hazardous energy control training.

Employer filed timely appeals of the citations on the grounds that the safety orders were not violated, the classifications are incorrect, and the penalties are unreasonable. Employer also asserted the affirmative defense of independent employee action as to both citations.

The matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on April 26, 2022. The hearing was conducted with the parties appearing remotely via the Zoom videoconferencing platform. Jessica Brown Wilson of Fisher Broyles, LLP, represented Employer. Manuel Arambula, staff counsel, represented the Division. The matter was submitted for decision on August 9, 2022.

Issue

1. Did the Division establish violations of the safety orders?

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Findings of Fact

1. On December 16, 2021 the Appeals Board issued an Order After Prehearing Conference ordering the parties to arrange for the appearance of each of their witnesses at the noticed video hearing set for January 19, 2022.

2. On January 17, 2022, the Division filed a Motion to Continue the hearing. Over Employer's objections, the continuance was granted.

3. On January 26, 2022, a Notice of Hearing was served upon the parties providing the new hearing dates of April 26 and April 27, 2022. The December 2021 Order After Prehearing Conference remained in effect.

4. On April 20, 2022, Employer asked ALJ Avelar and the Division via email whether two of Employer's witnesses requiring interpreters could be allowed to testify prior to 3:30 p.m. on April 26, 2022.

5. On the same day, the Division replied via email requesting Employer to justify the request.[2]

6. On April 21, 2022, the ALJ responded to the parties via email instructing that, absent a stipulation, witnesses will not be taken out of order. The parties presented no agreement to take witnesses out of order.

7. The Division's witness, compliance safety and health officer Mike Torres (Torres), had pre-existing travel plans for April 26, 2022.

8. Before the hearing started, the Division excused Torres from testifying on April 26, 2022.

9. At the hearing on April 26, 2022, the Division informed Employer and the Appeals Board that it had no witness to support its case in chief.

10. District Manager Darcy Murphine (Murphine) did not serve as the Division's representative at the April 26, 2022 hearing and did not attend the hearing.

[2] The email correspondence of the parties is filed as a document in the case.

11. Employer objected to presenting its case in chief prior to the Division's case in chief and objected to a second continuance of the matter.

Analysis

1. Did the Division establish violations of the safety orders?

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

At the commencement of the hearing on April 26, 2022, the Division disclosed for the first time that its primary witness, Torres, was travelling to attend his son's wedding, making him unavailable in the afternoon. The Division asserted that Torres was actually available to testify in the morning, but the Division elected to release him for the entire day. The Division provided assurances that Torres would be available at 9:00 a.m. on the second day of hearing, April 27, 2022. The Division thus requested Employer to present its case first. Employer objected to mounting a defense before the Division presented any evidence.

Upon prompting from the undersigned, the Division tendered that, if the ALJ so desired, the Division would secure a strategically reserved rebuttal witness within 20 minutes to testify. Employer objected.

Approximately 50 minutes into the hearing day, the Division still had no witnesses present, and the record closed.

Presentation of Employer's defense before the Division's case in chief

An employer is not obligated to present a defense. (See Evidence Code §550). The Appeals Board has long held that after a *prima facie* showing of a violation by the Division, the burden of producing evidence then shifts to an employer. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (Jul. 30, 1982).) "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding

as to Employer." (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

The Division wanted Employer to mount a defense before the Division presented its case in chief. The Division carries the burden of proof. Absent an agreement of the parties, an employer cannot be compelled to present first. Here, Employer objected.

Additional delay for unsecured rebuttal witness

Evidence Code § 320 provides that a court in its discretion shall regulate the order of proof. Evidence Code § 352, authorizes a court to exclude evidence in its discretion if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. Authority to exclude is also restated in section 376.2. Testimony that is not crucial but merely collateral to a resolution of a case may be limited. (*Matarozzi-Pelsinger Builders, Inc.*, Cal/OSHA App. 01-1400, Decision After Reconsideration (Aug. 12, 2004).)

The Division contended that, if the ALJ should so direct, a reserved rebuttal witness could be called. The Division emphasized its intent to strategically wait for the testimony from Employer's witnesses before proceeding. The Division proposed that if the ALJ "wants," it would call Murphine. The Division then qualified its offer with the proviso that testimony of prior witnesses would have been determinative as to whether it would have presented Murphine, explaining that the Division "intended to use her possibly as a rebuttal witness, possibly as a substantive witness, depending on the breakdown of the testimony." At approximately 9:40 a.m., the Division averred, "with that one caveat, judge, I'm happy to put on Ms. Murphine in the next 20 minutes, I can get her on board."

The probative value of a rebuttal witness with no prior testimony to rebut is substantially outweighed by the probability that its admission will necessitate undue consumption of time, particularly if securing the witness required more time. Murphine's general absence, even as the Division's representative, reveals the Division's estimation of her value in support of its case. Counsel for the Division asserted that he, "actually spoke to Ms. Murphine, I told her I need you to be ready within the next few minutes – if necessary," casting further doubt that her attendance was anticipated. Forbearance for any length of time would not affect the certainty that the Division had no meaningful case to present without Torres. Thus, Murphine's testimony was excluded.

The Division took no steps to mitigate delays. The Division did not secure any other witness prior to the hearing or during the recess. Instead, 40 minutes into the proceedings, the Division proposed further delay for the indefinite procurement of a witness. The Division noted, fairly, that it was, "entitled to present all day long if necessary." However, this presupposes punctual presentation of a case in chief, not claiming both days of a two-day hearing. The Division

presented no evidence or any stipulations to support the alleged violations. It relied instead solely on the requisition of even more time to cast for a witness.

Continuance of the hearing

The Division had no witness at the hearing to support its case in chief. With no primary witness, the Division requested that Employer present its own case in chief first. In essence, the Division was not prepared to present its case on the first day of a two-day hearing and was asking permission to begin presentation of its case in chief on the second day.

Section 371.1, entitled "Motions Concerning Hearing Dates" provides, in relevant part:

> (a) Continuances are disfavored.
> […]
> (e) Each request for a continuance shall be considered on its own merits. The motion shall be granted on an affirmative showing of good cause. The following circumstances shall be considered when determining whether good cause exists for the granting of the continuance:
>
> (1) The unavailability of an essential witness, party, counsel or representative because an emergency arises, including, but not limited to, death or incapacitating illness.
> […]
> (3) The age of the case and whether there were any previous continuances.
> […]
> (5) The prejudice that parties or witnesses will suffer as a result of the continuance being granted or denied.
> […]
> (7) Whether an alternative short of continuing the entire hearing, such as leaving the record open to allow testimony of an unavailable witness or witnesses at a later time, would accommodate the needs of the moving party while allowing the matter to proceed in the meantime.
> […]
> (10) Whether the conflict necessitating the continuance was either foreseeable or created by the party(ies) or the party(ies) representative(s).
> (11) Any other fact or circumstance relevant to the fair determination of the motion.

The factors above will be examined after the following summary of the relevant procedural history.

On November 14, 2021, the Appeals Board issued a Notice of Video Hearing set for January 19, 2022. On December 16, 2021, the Appeals Board issued an Order After Prehearing Conference ordering the parties to arrange for the appearance of each of their witnesses at the noticed video hearing. On January 17, 2022, two days prior to the hearing, the Division requested a continuance. On January 18, 2022, the Appeals Board issued an Order on Motion granting the Division's continuance request. On January 26, 2022, a Notice of Hearing was served upon the parties providing the new hearing dates of April 26 and 27, 2022.

On April 20, 2022, six days prior to the rescheduled hearing, Employer emailed the undersigned and Division's counsel, asking for permission for two of Employer's four witnesses to testify before 3:30 p.m. on the first day of hearing, proposing that an interpreter would then be booked accordingly. In its response, the Division did not consent to taking witnesses out of order. The undersigned replied the parties would need an agreement to take witnesses out of order and instructed the parties to confer. Neither party thereafter filed a motion to continue or presented any request or agreement to present evidence or witnesses out of order.

Witness unavailability

As the Division's inspector who issued the citations, Torres is a key, if not essential witness for the Division. However, his unavailability due to pre-planned travel for a son's wedding is not an emergency. According to the Division, Torres was actually available for the morning of April 26, 2022, but the Division chose to release him for the whole day. The Division justified the excusal, claiming that Employer's request of April 20 for special scheduling of two witnesses was vague and that the ALJ provided no guidance. Torres's travel plans and his excusal ostensibly occurred prior to the hearing, but the Division did not explain why it delayed providing the status until the morning of the hearing. This factor thus does not weigh in favor of the Division.

Age of case and prior continuances

The appeal was docketed on September 23, 2020, and the hearing was set for January 19, 2022. The Division was not represented by counsel and Murphine was its representative. On January 16, 2022, Murphine emailed the undersigned and Employer requesting a continuance due to illness. Employer objected by email, citing significant expenditures in preparation for the hearing, and noting that videoconferencing and other logistics permit pressing forward. The undersigned responded by email, instructing the Division to file a formal motion.[3] On January 17, 2022, the Division filed its first continuance request. The motion was filed and granted.

[3] The email correspondence of the parties is filed as a document in this case.

Prior to the April 26, 2022, hearing, the Division obtained counsel. Its request to delay presenting its case in chief until the second day of hearing is considered a second request for a continuance. This factor does not weigh in favor of the Division.

Prejudice

The Division failed to convey important information about witness availability until the very morning of the hearing. The Division did not confer with Employer or notify the Appeals Board about Torres's pre-planned travel. The Division did not disclose its decision to excuse Torres, causing Employer to expend resources in preparation for the hearing.

A continuance to the second day of hearing increases the certainty that the proceedings will spill over into additional days of hearing. The Division did not share information that could have spared Employer the costs of preparation for a second and third day of hearing. Yet, denying a continuance imposes significant consequences upon the Division. However, the Division took a calculated risk and thus wholly and solely created its own dilemma. Prejudice thus does not weigh in favor of the Division.

Alternatives

The Division was not prepared to proceed on the day of hearing. It requested Employer to go first. Employer vigorously objected to presenting its case in chief prior to the Division making its case. Employers are not required, thus even less often prepared, to present their case in chief prior to the Division's presentation. This alternative is thus unviable.

Upon prompting from the undersigned, the Division proffered a "strategically reserved rebuttal witness." The Division then revealed that the witness was not readily available, needing some coordination and a further delay of approximately 20 minutes. This belated proposal did not appear to meet the needs of the moving party or allow the matter to proceed in the meantime because its viability required additional delay for uncertain value. As discussed above, Murphine did not attend the hearing at all, even as a representative of the Division, implicitly indicating her marginal value to the support of the Division's case. Distending time with an unsecured and clearly peripheral substitute is not an alternative to a continuance.

No other alternatives were presented. Thus, this factor does not weigh in favor of the Division.

Foreseeability

On January 26, 2022, the Appeals Board issued notice for the hearing dates in April, providing the parties four months of advance notice. A scheduling conflict concerning pre-planned travel should have been apparent and thus foreseeable to the Division at any point during the four months prior to the April hearing. A scheduling conflict should have been especially apparent one week prior to the hearing when Employer initiated a discussion about scheduling an interpreter.

On April 20, 2022, Employer proposed special scheduling for two of its witnesses needing an interpreter. Employer requested agreement and approval before booking the interpreter accordingly. Even then, one week prior to the hearing, the Division could have conferred with the Employer regarding mutually beneficial accommodation of witnesses. Instead, the Division responded with grievances and threats concerning totally unrelated topics.[4] Foreseeability thus weighs heavily against the Division.

Other relevant circumstances

When Employer made its request to accommodate two witnesses, the Division did not provide consent. The Division's content and tone gave no suggestion that it would later yield consent. The Division's correspondence left no room for ambiguity. The undersigned instructed the parties that such scheduling required a stipulation. In the end, no agreement was ever presented.

The Division's response to Employer's inquiry effectively foreclosed further discussion. Yet, the Division asserted, "[…] having received no guidance from either the court or from Ms. Wilson about what's going to happen, I did the only thing, I'm not going to disrupt this man's otherwise scheduled travel, to simply accommodate a request that, at the time that it was made, vague and uncertain, and then have him – he complied in good faith, he was here." The Division quietly and intentionally elected to prioritize Torres's travel instead of the presentation of its case. Then, at the hearing, the Division requested a courtesy similar to that which it denied to Employer.

In sum, the Division unilaterally created the unavailability of its own witness for reasons unrelated to any illness or emergency. Despite numerous ongoing opportunities, the Division failed to manage its scheduling conflict or alert anyone about the conflict to ask for help. For these and all the foregoing reasons, the Division failed to show good cause to continue the hearing.

The Division presented no evidence, witness, or stipulation to support the alleged violations. The Division thus failed to establish any violation by the preponderance of the evidence.

[4] See footnote 2.

Conclusion

Employer objected to mounting a defense prior to the Division's case in chief. Employer did not agree to call witnesses out of order and the undersigned declined to permit additional delay. The Division did not provide good cause to continue the hearing. Employer did not stipulate to a continuance. The Division did not present its case in chief or otherwise show by a preponderance of the evidence that Employer violated any safety orders. Thus, Employer's appeals of Citation 2, Item 1, and Citation 3, Item 1, are granted.

Order

Citation 2, Item 1, and its associated penalty, are vacated.

Citation 3, Item 1, and its associated penalty, are vacated.

Dated: 08/24/2022

Rheeah Yoo Avelar
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**