BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection Number
NATURAL ALTERNATIVES INTERNATIONAL, INC. **1535 FARADAY AVENUE** **CARLSBAD, CA 92008** **Employer**	**1465354** **DECISION AFTER RECONSIDERATION AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Background and Procedural Summary

This matter arises from the appeal of workplace safety citations issued by the Division of Occupational Safety and Health (the Division) to Natural Alternatives International, Inc. (Employer). Employer formulates and manufactures customized nutritional supplements. An employee was injured on the job when he reached his arm into a 200 cubic foot GEMCO blender (an industrial sized blender that is eight percent smaller than a 6' x 6' x 6' cube) used to mix nutritional supplements.

On August 26, 2020, the Division issued Employer three citations alleging the following violations: Citation 1, Item 1, alleged a General citation, for violations to title 8 of the California Code of Regulations[1] section 3203, subdivision (a)(4) [failure to establish and implement an effective Injury and Illness Prevention Program], Citation 2, Item 1, alleged a Serious violation of section 3314, subdivision (g)(1) [failure to include a procedure for clearing batch materials during mixing process in lockout/tagout procedures], and Citation 3, Item 1 alleged a Serious, Accident-Related violation of section 3314, subdivision (l)(1) [failure to train employees on the hazards related to use of machinery, resulting in serious injury], for which the Division proposed total penalties of $23,435.00.

In September of 2020, Employer timely appealed Citation 2, Item 1, and Citation 3, Item 1, asserting the Independent Employee Action Defense on both Citations, and challenging the total penalties of $23,060. In November of 2021, ALJ Rheeah Yoo Avelear was assigned to the matter and a video hearing was set for January 19, 2022.

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

On January 10, 2022, Senior Safety Engineer Darcy Murphine requested the Board issue subpoenas for retired DOSH Safety Engineer Mike Torres and Milo Fox (an employee of Employer) to attend the hearing. On January 14, 2022, Employer filed a Motion to Quash the subpoenas of Torres and Fox on the grounds the subpoenas were untimely and lacked both the required affidavits and a valid proof of service.

On Sunday January 16, 2022, Murphine emailed ALJ Avelar requesting a continuance due to her testing positive for Covid-19. Employer's attorney, Jessica Brown Wilson with Fisher Broyles, LLP of Dallas, Texas, emailed ALJ Avelar objecting to the continuance. Judge Avelar replied that a motion for a continuance must be filed pursuant to section 371.1. Murphine promptly prepared the required documents and sent a PDF of the documents to ALJ Avelar, the same day. On January 17, 2022, Employer's attorney emailed ALJ Avelar saying she could not open the PDF file attached to Murphine's email and therefore it had not been properly served. On January 18, 2022, ALJ Avelar granted the Division's Motion, noting it was the Division's first request for a continuance, and granted Employer's Motion to Quash the Subpoenas of Torres and Fox. The hearing was reset for April 26 and 27, 2022. On March 8, 2022, attorney Manuel (Manny) Arambula was brought in to represent the Division.

On Wednesday, April 20, 2024, Employer's attorney emailed ALJ Avelar, asking that two of Employer's witnesses who work at Employer's manufacturing facility be allowed to testify out of order, before 3:30 p.m., on the first day of hearing. The email indicated this would allow Employer to not have to completely stop production at the manufacturing facility and Employer would only have to pay for one day of translator services. The Division's attorney emailed ALJ Avelar, stating he was open to Employer's request but asked that Employer provide a rationale stating the exigent circumstances or practical difficulties for why the evidence at the hearing should be taken out of order. The email also objected to a paralegal of Employer's attorney having directly emailed Torres (a retired DOSH inspector), before the Motion to Quash Subpoenas was granted, telling him not to appear based on Employer's Motion to Quash, and for the same paralegal to directly call and leave a phone message for Torres telling him not to appear.

Employer's attorney's emailed ALJ Avelar objecting "to the sidebar communications and accusations from Ms. [sic] Arambula" and characterized the Division's email as "meant as harassment and to give a false impression about me and my clients a week before the hearing."

The Division's attorney emailed ALJ Avelar citing the California Rules of Professional Conduct, Rule 4.2, subdivision (a) regarding contact with an individual represented by counsel, mentioning that he is also a member of the Texas bar, and citing the Texas Disciplinary Rules of Professional Conduct, Rule 4.02 regarding "Communication with One Represented by Counsel." The email concluded by emphasizing the Division does not consent to Employer's attorney speaking directly to Torres, quoting from the paralegal's phone message, characterizing it as "a legally incorrect statement," and indicating this email was the last courtesy warning and should Employer's attorney have further contact with Torres, the Division would move for sanctions and report the conduct to the California State Bar.

Employer's attorney emailed ALJ Avelar (now addressing Division's counsel as Mr. Arambula), demanded documentation showing that the Division's attorney represented Torres, and stating, "Your accusations are egregious, unfounded, and are not taken lightly. My clients will be investigating appropriate action for your baseless threats in front of the judge that taints due

process." ALJ Avelar emailed both parties stating "the parties would need to agree to take witnesses out of order," however, the parties did not reach an agreement concerning the order of the proceedings before the hearing.

ALJ Avelar opened the hearing at 9:29 a.m. on April 26, 2023, and asked for the Division's proposal as to how to proceed. The Division's counsel informed the Board that the Division's primary witness, retired compliance and safety officer Mike Torres, had been available in the morning, but given Employer's counsel's request to have two witnesses testify before 3:30 p.m., and Torres' pre-existing travel plans, the Division's counsel had excused Torres for the entire day to attend his son's wedding. Because he had excused Mr. Torres, Division's counsel proposed the hearing proceed with the Employer presenting its case-in-chief first. Employer objected, as employers cannot be required to present a defense before the Division presents its case-in-chief.

The Division indicated it was ready to present its other witness, Murphine, and requested a brief recess of 20 minutes to bring Murphine into the hearing. ALJ Avelar stated:

> I'm disinclined to have our employer wait further. I don't find good cause for either of the witnesses to not be available at this time. What we're going to do is … I need to just … I don't see that there's anything else I can add. At this point in time what we're gonna do is we'll close the record since we don't have anything to go forward on given the time and date and a lack of finding on the cause in this matter. I want to say thank you to the parties this morning, and we will go … the record is closed.

The Division asked if the ALJ was making "an actual finding there's no evidence when I've just said that in fact I do have a witness that is willing to testify within the next few minutes?" The Division went on to say "I want it on the record that the court is denying me the opportunity to present the case such as it is with Ms. Murphine." ALJ Avelar declined to let the Division present its witness, stating, "I'm going to note that it's 9:40, and we're well into our hearing date, and we don't have any witnesses."

The Division reiterated that it was ready to move forward, stating "Ms. Murphine is available right now, it literally is just her logging on." The Division asked under what authority the ALJ was granting this [ending the hearing and closing the record], when the Division had not made a motion for continuance, but a motion for a brief recess. ALJ Avelar cited to section 350.1. Employer objected to a grant of continuance and requested the ALJ dismiss the case. The Division reiterated the witness was "ready to go, all she needs to do is log on," and clarified it had not made "a motion for a continuance, [but] a motion for a recess, so that this witness can come on."

At this point the Employer's attorney and the Division's attorney had a brief argument about the propriety of the Employer's attorney's staff contacting the Division's retired employees, a matter which is irrelevant to this decision. When that exchange ended, ALJ Avelar stated: "at this time what we will do is close the record and step off, and the decision will be issued within the regular timeframe." The entire hearing record lasted approximately 23 minutes, and concluded at approximately 9:52 p.m.

On August 8, 2022, the Division filed a "Motion to Set Matter for Hearing on the Merits." On August 9, Employer objected to any further hearings being set, and filed a "Motion for Hearing Decision Dismissing Citations." ALJ Avelar did not issue a decision on either motion.

On August 24, 2022, ALJ Avelar issued a Decision finding that the Division failed to present any evidence and granted the Employer's appeal on both Citations 2 and 3 as a result. On September 28, 2022, the Division filed a Petition for Reconsideration (Petition) and on October 28, 2022, the Employer filed an answer to the Division's Petition. On November 7, 2022, the Board took the Division's Petition under submission.

ISSUES

The primary issue in the Division's petition is whether ALJ Avelar's decision to not allow the Division to put on witness Murphine, and to end the hearing and close the record, was proper.

DECISION AFTER RECONSIDERATION

The Decision makes 11 findings of fact, two of which are problematic and set out below. Findings of fact numbers nine and ten state:

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

Finding of fact number nine is unfounded, and finding of fact number ten ignores the Division's repeated attempts to call Murphine as a witness.

At the hearing, the Division did not say it had no witness ready to support its case-in-chief. Division's counsel, on his own initiative and without obtaining Employer's stipulation or the ALJ's permission, had allowed the (retired) inspector to not show up on the morning of the first day of the hearing as he was travelling to attend his son's wedding that afternoon. Division's counsel apparently assumed Employer would agree to put on its witnesses first and out of order, an unreasonable assumption given the history of tense exchanges between counsel, and the requirement that the Division put on its case first. Further, Employer's counsel had only asked, in effect, to interrupt the Division's case-in-chief by having two witnesses heard on the first day, not to precede the Division's case entirely. ALJ Avelar was within her discretion to not delay the hearing to the next day when the inspector would be available.

However, while the Division had put itself in the position of not having its primary witness available that morning, Division's counsel had Murphine ready to testify within a relatively short time-frame. The Division's counsel stated that he had originally planned to have Murphine testify in rebuttal after Employer's witnesses had testified, but that does not mean the Division was precluded from calling her at an earlier time. The Division can typically (subject to some qualification) call its witnesses in any order it sees fit. Further, there is no indication that Murphine did not have probative and relevant testimony to offer. Division's Counsel did not say that

Murphine had never visited the worksite, or that Murphine had no direct knowledge of relevant facts. In fact, Division's counsel repeatedly offered that Murphine was available and ready to testify, and just needed to log on. Had ALJ Avelar proceeded with Murphine's testimony, that testimony could have supported the Division's case-in-chief. The Division's counsel also said Torres would be available to testify at the start of the next day.

That Murphine did not attend the April 26, 2022, hearing was not due to a lack of effort by the Division, which first moved for a brief recess of 20 minutes to let Murphine know it was time for her to log on and attend. The Division's counsel repeatedly stated Murphine was ready to log on, and he shortened the estimate of how long he needed to get her logged on as the awareness dawned on him that ALJ Avelar was actually closing the record and ending the hearing with the Division having put on no evidence to support the citations.

In response to the Division's inquiry as to the regulatory or statutory basis for the decision to end the hearing and close the record, ALJ Avelar cited Board regulation section 350.1 ("Authority of Administrative Law Judges"), which provides in subdivision (a):

> In any proceeding assigned for hearing and decision . . . an Administrative Law Judge shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Appeals Board, … to regulate the course of a hearing, … to rule on objections, defenses, and the receipt of relevant and material evidence, … to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for *the full adjudication of the matter*, or take other action … that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act. (emphasis added).

Ending the hearing without it having been established that Murphine's testimony could not support the Division's case in chief was premature. While ALJ Avelar was empowered to regulate the order of proof, Board regulation section 350.1 makes clear that power is generally to be wielded to achieve a full adjudication of the matter. The Board's regulations at section 376.1, subdivision (d) state: "The taking of evidence in a hearing shall be controlled by the Appeals Board in the manner best suited to ascertain the facts and safeguard the rights of the parties." The Board, like other California courts, prefers matters to be decided on the merits, rather than on technicalities. (*Luis & Miguel Aguirre dba Aguirre Cutting Service,* Cal/OSHA App. 12-2872, Decision After Reconsideration (December 20, 2012) *see also Shamblin v. Brattain* (1988) 44 Cal. 3d 474, at 478).

The Decision justifies disallowing Murphine's testimony and closing the record by citing to Evidence Code section 320, which allows a court to regulate the order of proof, and Evidence Code section 352 which states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,

or of misleading the jury." However, we disagree that either of these sections form a basis for affirming the ALJ's Decision.[2]

Again, while the ALJ is empowered to regulate the order of proof, that power should be wielded toward deciding matters on their merits. (*Luis & Miguel Aguirre dba Aguirre Cutting Service*, supra, Cal/OSHA App. 12-2872.) Further, the ALJ simply had insufficient information to determine that the probative value of Murphine's testimony was outweighed by a substantial danger of undue consumption of time, substantial prejudice, or confusion. From the record of the hearing on April 26, 2022, it cannot be established whether Murphine had sufficient independent knowledge of the facts to testify as the Division's witness. However, even assuming, arguendo, she had no first-hand knowledge, it still does not mean she should have been prohibited from testifying. Board regulation section 376.2 allows the use of hearsay evidence to supplement or explain other evidence, and there is no requirement that the non-hearsay evidence be presented before the hearsay evidence. The Board's regulations make clear at section 376.2, "[t]he hearing need not be conducted according to technical rules relating to evidence and witnesses." The judge's decision to simply disallow Murphine's testimony cannot be upheld by the Board.

DECISION

For the reasons stated, the ALJ's Decision is reversed. The matter is remanded for further proceedings.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 06/24/2024

[2] This is despite the Board having similar evidentiary rules. The Board's regulation section 350.1 allows the Board to regulate the course of a hearing. Section 376.1, subdivision (d) empowers the Board to control the taking of evidence. Section 376.2 allows the Board to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.