

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

In the Matter of the Appeal of:

FCI CONSTRUCTORS  
12777 High Bluff Drive, Suite 200  
San Diego, CA 92130

Employer

Docket Nos. 01-R4D4-2161  
and 2162

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by FCI Constructors (Employer) under submission, makes the following decision after reconsideration.

**JURISDICTION**

On January 29, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation inspection at a place of employment maintained by Employer at 1750 Monte Vista Avenue, Claremont, California (the site). On May 24, 2001, the Division issued citations to Employer alleging serious violations of sections 1509(a) [Injury and Illness Prevention Plan] and 1511(b) [Safety Survey] of Title 8, California Code of Regulations,<sup>1</sup> with proposed civil penalties totaling \$23,060.

Employer filed a timely appeal contesting the existence and classification of the alleged violations, the reasonableness of both the abatement requirements and the proposed civil penalties, and alleging affirmative defenses. On April 23, 2002, the Appeals Board issued a Notice of Hearing for June 26, 2002.

On June 25, 2002, the Division served the Appeals Board with a request to continue the June 26, 2002, hearing because one of its witnesses would be unable to attend. That same day the Executive Officer of the Appeals Board issued an order (the "June 25 Order") denying the continuance request.

---

<sup>1</sup> Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

A hearing was held before Dale Raymond, Administrative Law Judge (ALJ) of the Board, on June 26, 2002. Robert Peterson, Attorney, represented Employer. Vicki Albano, District Manager, represented the Division.

At the hearing the Division sought to withdraw Citation Nos. 1 and 2 after it was unable to produce a witness. The ALJ, finding good cause was established, granted the motion. On June 26, 2002, the ALJ issued an order granting the Division's motion to withdraw Citation Nos. 1 and 2 and the related civil penalties (the "ALJ's June 26 Order").

On July 25, 2002, the Appeals Board issued an Order (the "July 25 Order") which set aside the Executive Officer's June 25 Order denying the continuance request. The Board's July 25 Order further referred the matter to the Presiding ALJ to set a new hearing date.

On November 19, 2003, in accordance with the July 25 Order, the Appeals Board issued a Notice of Hearing. On February 4, 2004, Employer filed a Motion to Cancel Hearing with the Appeals Board. On February 13, 2004, the Division filed an Opposition to the Motion to Cancel Hearing and requested a continuance of the hearing. On March 1, 2004, the Executive Officer of the Appeals Board granted the continuance motion. On March 24, 2004, the ALJ issued an order denying Employer's Motion to Cancel Hearing.

Employer filed a petition for reconsideration on April 6, 2004, from the order denying the motion to cancel hearing. The Division did not file an answer. The Board then took Employer's petition for reconsideration under submission on May 26, 2004, and stayed the two ALJ orders dated March 24, 2004,<sup>2</sup> pending a decision after reconsideration.

## **ISSUES**

Did the ALJ's Order granting the Division's motion to withdraw the citations become a final order of the Appeals Board?

## **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

**The ALJ's Order is the Final Order of the Appeals Board Because it Was Not Reconsidered.**

The applicable Labor Code and Board Regulation sections are as follows:

---

<sup>2</sup> An ALJ had also issued an Order granting party status on March 24, 2004.

Labor Code section 6614 reads:

(a) At any time within 30 days after the service of any final order or decision made and filed by the appeals board or a hearing officer, any party aggrieved directly or indirectly by any final order or decision, made and filed by the appeals board or a hearing officer under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order or decision and specified in the petition for reconsideration. Such petition shall be made only within the time and in the manner specified in this chapter.

(b) At any time within 30 days after the filing of an order or decision made by a hearing officer and the accompanying report, the appeals board may, on its own motion, grant reconsideration.

Board Regulation section 390.3(a) states in part:

If within 30 days of the filing of an order or decision no petition for reconsideration has been filed, and no reconsideration has been ordered on the Appeals Board's own motion, the order or decision is a final order of the Appeals Board...

Employer believes that its Motion to Cancel Hearing should have been granted because the ALJ's June 26 Order is the final order of the Board, thereby making any further hearing in this matter moot. Conversely, the Division asserts that Employer's Motion to Cancel Hearing is unfounded because the Board's July 25 Order implicitly overruled the ALJ's Order. Thus the proper outcome in this case can only be reached after the current status of the ALJ's Order is determined.

The Labor Code and Board Regulations set forth two procedures the Board can utilize in order to prevent an ALJ order from becoming a final order of the Appeals Board. (See Labor Code § 6614 and Board Regulations §§ 390.1 and 390.3(a).) As such, if the Board were to have implemented one of those procedures the ALJ's Order would *not* be the final order of the Board. On the other hand, if the Board did not use either procedure, the ALJ's Order would now be a final order of the Board making further hearings in this matter improper. It is therefore incumbent upon the Board to determine whether any action was taken which would have prevented the ALJ's Order from becoming a final order.

One way in which the Appeals Board can prevent an ALJ's order from becoming a final order is by taking a petition for reconsideration which challenges the ALJ's actions under submission. (See Board Regulation § 390.3(a) and Labor Code § 6614(a).) Upon reviewing the record however, it is found that Employer did not submit a petition for reconsideration. Moreover, the Division, whose actions led to the ALJ's Order, also failed to seek reconsideration. Accordingly, the Board concludes that the ALJ's Order was

not affected by the Board taking a petition for reconsideration under submission.

Another way in which the ALJ's Order would not have become a final order is by the Appeals Board ordering reconsideration of this matter on its own motion. (See Board Regulation § 390.3(a) and Labor Code § 6614(b).) But a review of the record does not indicate that the Board ever ordered reconsideration of the ALJ's Order. Although the July 25 Order does address the Executive Officer's actions, a simple reading of this document demonstrates that the Board did not order reconsideration of the ALJ's Order.

The Board's July 25 Order does not follow the notice requirements needed for a Board order of reconsideration to be valid. Board Regulation section 390.2(a) states in part that the "Appeals Board shall notify the parties if it orders reconsideration." Nothing in the record however suggests that Employer or the Division were provided with notice that reconsideration had been ordered by the Board. Thus, the July 25 Order does not explicitly address the ALJ's Order and the lack of subsequent notice to the affected parties shows that the Board had not intended to grant reconsideration. These two factors lead to the conclusion that the Board neither ordered nor intended to order reconsideration of the ALJ's Order. Therefore, the ALJ's Order was not affected by a Board order of reconsideration.

Accordingly, after a review of the record it is found that the Board took no action which would have prevented the ALJ's Order from becoming the final order of the Board. Consequently, the ALJ's Order is found to be the final order of the Board making further proceedings in this matter improper. As such, Employer's motion to cancel the hearing is granted and the motion of Stephen McCarty for party status is moot.

#### **DECISION AFTER RECONSIDERATION**

The ALJ's Order of June 26, 2002, granting the Division's motion to withdraw Citation Nos. 1 and 2, and the related civil penalties, is affirmed.

ROBERT PACHECO Acting Chair  
MARCY V. SAUNDERS, Member  
JANET M. EAGAN, Deputy Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: April 20, 2006