

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CENTRAL CHEVROLET
4949 Thornton Avenue
Fremont, CA 94536

Employer

Docket Nos. 05-R1D4-2615
through 2618

**DECISION AFTER
RECONSIDERATION
AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), having taken this matter under reconsideration on its own motion, issues this Decision After Reconsideration and Order of Remand pursuant to the authority vested in it by the California Labor Code.

Background and Jurisdictional Information

From April 12, 2005 through June 29, 2005, the Division of Occupational Safety and Health (the Division), conducted an accident inspection at Central Chevrolet (Employer), located at 36849 San Pedro Drive in Fremont, California.

Employer was cited for the following violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations:¹ Section 3556(a) (general) and sections 3314(c), 3314(g), and 3314(j) (serious).

Employer filed timely appeals of all four citations, contesting the violations' existence and classifications, and the reasonableness of both the abatement requirements and the civil penalties. In addition, Employer asserted a lengthy series of affirmative defenses.

On August 7, 2007, this matter was heard by an Administrative Law Judge (ALJ) for the Board. At the outset of the hearing, Employer moved to exclude the testimony of the Division's witnesses because the Division failed to comply with one aspect of Employer's written discovery request of July 20, 2005. Specifically, the Division failed to provide a list of witnesses with

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

knowledge of the events leading to the citations and a list of witnesses to be called to testify at the hearing. Employer provided a copy of its two-page discovery request, which was addressed to the Division's former Oakland District Manager, Michael Horowitz. Employer acknowledged that the Division provided the other information requested in the letter.

At the hearing, Division representative Nick Gleiter stated that the Division intended to call the Division compliance officer who had investigated the matter to testify. Gleiter explained that without this testimony, the Division would be unable to defend the citations. He noted that it is the District Office's current policy to comply with the witness list request promptly after it is made, but he acknowledged that the policy was not followed in this case.

In ruling on this matter, the ALJ, relying upon *Donald B. Murphy Contractors Inc.* Cal/OSHA App. 04-1940, Decision After Reconsideration (Jan. 4, 2007) and *California Pipe Line, Inc.* Cal/OSHA App. 00-2739, Decision After Reconsideration (April 3, 2002), granted Employer's motion to exclude the Division's witness. In response to the Division's acknowledgement that it would be unable to present any evidence if precluded from presenting witness testimony, the ALJ granted Employer's appeals to all citations.

On October 23, 2007, the Board took this matter under reconsideration on its own motion to consider whether the ALJ properly ruled on Employer's motion. Employer and the Division filed answers to the Board's order.

Both parties argued that the issue stated in the Board's order was too vaguely stated to provide adequate notice regarding the question the Board intended to address. In response, we note that the Board often does not specify its reasons for taking an ALJ decision under reconsideration. In this instance, the Board stated its concern and chose to phrase it broadly because it intended to consider the ALJ's decision broadly and did not want to unintentionally limit the discussion.

Moreover, the issue presented is not new or esoteric. The Division and Employer representatives involved in this matter are experienced practitioners before this Board and should be intimately familiar with Board procedural rules and the type of issues pertinent to determining whether the ALJ properly granted Employer's appeals based on the Division's failure to produce the witness lists requested. Given the foregoing, we fail to see how due process was denied. The parties have cited no authority that persuades us that it was. We now examine the matter before us.

ISSUE

Did the Administrative Law Judge properly rule on Employer's request to exclude witness testimony?

a. Board Regulations pertaining to Discovery

We first examine applicable Board regulations (Rules) on discovery and sanctions for abuse of discovery practices. Board Rule, section 372, pertains to identity of witnesses and states as follows:

After initiation of a proceeding, a party, upon written request made to another party, is entitled to obtain prior to the hearing the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing. Nothing in this section requires the disclosure of the identity of a person who submitted a complaint regarding the un-safeness of an employment or place of employment unless that person requests otherwise. **A request under this section for a list of witnesses to be called may be satisfied only by the service of a list of witnesses.** (Emphasis added)

The bolded language above was added, effective September 1999, to clarify that witnesses to be called to testify had to be identified in a specific list.² Previously, parties argued that the witness identification requirements were met if a witness was simply referred to in documents included in the record. The amendment was intended to put that argument to rest and to clarify the parties' obligation.

Board Rule, section 372.6 sets out procedures to compel compliance with a party's discovery request. It provides, in part, that a party claiming that another party has failed to comply with a discovery request may serve and file a motion to compel discovery with the ALJ assigned to the case. Generally, any such motion is required to be served and filed 15 days after the non-compliance, or within 30 days after the request was made.

Board Rule, section 372. 7, addresses Discovery Abuses and states:

- (a) The Administrative Law Judge³ or the Appeals Board may impose sanctions on a party who fails to respond to an authorized request for discovery or makes an evasive or incomplete response to discovery where such action results in surprise to the requesting party at the hearing.
- (b) Such sanctions may include:

² The final statement of reasons in the official rulemaking file for the 1999 amendment to section 372 states "Existing Appeals Board practice has deemed a party to be in compliance with a discovery request for a list of witnesses it may call at hearing even if it provides no list, as long as it has complied with discovery requests for documentary evidence. It has been held that if the witnesses' identities can be inferred from the documents provided, then the obligation to provide witnesses' names created by section 372 has been satisfied. [heading omitted] The new language will require a party to provide a separate witness list or be deemed not in compliance with the discovery request for witnesses' names."

³ Discovery rules were amended in 1997 by adding that ALJs and the Board have authority to hear motions to compel and issue orders for compliance. This obviated the need for the parties to file their motions in superior court.

- (1) An order prohibiting the introduction of designated matters into evidence by the abusing party; and/or
- (2) An order establishing designated facts, claims, or defenses against the abusing party in accordance with the claim of a party adversely affected.
- (3) Any other order as the Administrative Law Judge or the Appeals Board may deem appropriate under the circumstances.

The Board has previously reviewed sanctions imposed by ALJs for parties' noncompliance and/or discovery abuse and has stated its position on the issues in various decisions after reconsideration. Decisions after reconsideration serve as guidance to the public and to ALJs in applying the Board's regulations. Prior conflicting Board decisions now make it necessary to re-examine the decisions relied upon below to determine whether they properly follow the discovery regulations.

b. Rules Governing the Interpretation of Administrative Regulations

The Board's discovery regulations are to be read and applied, so that each section interacts with other sections. See, *People ex. rel. Kennedy v. Beaumont Investment, Ltd.* (6th Dist. 2003) 111 Cal. App. 4th 102, citing, *Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal. 3d 1379, 1387. Statutory rules of construction and interpretation also apply to the interpretation of administrative regulations. *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1516 citing, *California Drive-in Restaurant Ass'n. v. Clark* (1943) 22 Cal.2d 287, 292.

In accordance with decisional law, words used in a regulation should be given the meaning they bear in ordinary use. If the language is clear and unambiguous there is no need for construction. See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Delaney v. Superior Court (Kopetman)* (1990) 50 Cal.3d 785, 798, 800.)

In addition, the construction of an administrative regulation and its application to a given set of facts are matters of law. *Goddard v. South Bay Union High School Dist.* (1978) 79 Cal.App.3d 98, 105, 144 Cal.Rptr. 701. A statute that has received an administrative interpretation comes to the reviewing court with a strong presumption of regularity. *Ibid.*; see also *Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 602 fn. 15.

c. Review of Board Precedent Relied on Below Pertaining to the Production of Witness Lists.

Prior to the Board's recent decision in *Donald B. Murphy Contractors, Inc.* Cal/OSHA App. 04-1940, Decision After Reconsideration (Jan. 04, 2007), the Board imposed sanctions for failure to produce a witness list consistent with the requirements of Board Rule section 372.7. Specifically, in the prior cases, the Board held that, before sanctions were imposed, there needed to be a

finding that the requesting party was “surprised” by the unidentified and not previously disclosed witness called to testify. See, *Yellow Freight Systems, Inc.*, Cal/OSHA App. 94-2565, Decision After Reconsideration (July 23, 1999); *California Pipe Line, Inc.* Cal/OSHA App. 00-2739, Decision After Reconsideration (April 3, 2002). This was true for Board decisions issued both before and after the 1999 amendment to section 372 explained above. *Id.*

In *Yellow Freight System, supra*, the Division failed to respond to the employer’s request for a witness list. The Board upheld the ALJ’s decision to exclude all Division witnesses except for the Division’s compliance officer (sometimes referred to as the “CSHO”). There, the Board reasoned that the CSHO was “the one witness who Employer had every reason to believe would be called to testify,” and therefore presented no surprise.

Similarly, in *California Pipe Line, supra*, the Division conceded that it did not provide the requested witness list. In that case, the employer only sought to preclude the Division’s District Manager from testifying. Despite the fact that he was not identified on a witness list, employer did not seek to exclude the CSHO’s testimony, and the CSHO was allowed to testify. However, the ALJ excluded the District Manager’s testimony because she found that the employer had been “surprised” by the disclosure that the District Manager was to testify.

In upholding the ALJ’s decision to exclude the District Manager’s testimony, the Board observed that the ALJ found that the employer “had been unable to properly prepare its case and had been deprived of the opportunity to either interview or depose [the District Manager].” *Id.* The Board commented that section 372.7 is “designed to benefit both parties and . . . ‘to eliminate surprise to prevent trial by ambush.’” (Citing *Yellow Freight System, supra*). Although the Board deemed the sanction of exclusion “harsh,” the Board referred to the language in section 372.7 and commented that the regulation affords the ALJ substantial latitude in devising the appropriate sanction.

In *Donald B. Murphy, supra*, the Board revisited this same issue. In that case, the ALJ issued an order precluding the Division from calling any witnesses at the hearing because the Division did not provide a witness list in response to the employer’s request as required by Section 372.

In reviewing the ALJ’s decision in *Murphy*, the Board considered the 1999 amendment to section 372 regarding the production of witness lists and specifically addressed the need for the Division to include CSHOs on the list. The Board held: “It is no longer the case that CSHOs are assumed to be witnesses and thus need not be listed in response to a witness list request.” We affirm that conclusion. The parties are not required to guess, or make assumptions, about the other’s intentions. See, *California Pipe Line, Inc., supra*.

Nonetheless, the Board went on to find that the ALJ correctly applied both Section 372 and the Appeals Board's previous decision in *California Pipe Line Inc.*, *supra*, in reaching the decision to exclude all Division witnesses. The Board held that the ALJ's sanction was appropriate although it had the effect of functionally granting the employer's appeal.

In affirming the ALJ's decision, the *Murphy* Board rejected the Division's argument that an employer needed to show specific prejudice or surprise arising from the Division's failure to provide a witness list before sanctions could be imposed. While the Board correctly concluded that prejudice need not be shown, we find that it erred in concluding that "surprise" is not a prerequisite to imposing sanctions.

Section 372.7 does not require proof of prejudice because the word "prejudice" does not appear in Board regulation 372.7. See, *California Pipe Line*, *supra*. However, Rule 372.7 does state sanctions may be imposed when a party fails or inadequately responds to a discovery request and "*such action results in surprise to the requesting party at the hearing.*"

Murphy's conclusion that surprise is not required is based, in part, on a misunderstanding of the Board's analysis in *California Pipe Line*, *supra*. The ALJ in the present case applied the same misconception. Specifically, in *California Pipe Line*, the employer argued that it was surprised by the Division's decision to call the District Manager to testify and the ALJ agreed. The Division argued that a finding of surprise was unwarranted. In response, the Board stated, "with regard to the question of surprise, the Division's argument is without merit[.]" In other words, in *California Pipe Line*, the Board found no merit to the Division's argument that the employer was not surprised.

In *Murphy*, the Division argued that the employer had claimed neither prejudice nor surprise when it moved to exclude the Division's witnesses. In response to the surprise element of this assertion, the Board quoted the referenced sentence from *California Pipe Line* and went on to state:

The language of section 372 is quite specific that a request for identity of witnesses 'may be satisfied only' by providing a list of witnesses. This makes the question of compliance starkly simple: did the party furnish the requested list. Therefore the sanction imposed by the ALJ here, exclusion of the unlisted witness, was within the ALJ's discretion.

Thus, in *Murphy*, the Board concluded that surprise need not be shown before sanctions may be imposed. Because the statement taken from *California Pipe Line* and used in *Murphy* was misconstrued, we hold that the conclusion reached in *Murphy* was inaccurate. The same is true with respect to the decision below in the instant case.

We affirm that the only means by which to comply with section 372 is to produce an actual list of witnesses. At the same time, we also reaffirm the conclusions of *Yellow Freight System, supra*, and *California Pipe Line, supra*, that sanctions may only be imposed for non-compliance upon a finding of surprise.

In reaching this conclusion, we cite the familiar rule of statutory construction that “statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.” *People ex. rel. Kennedy v. Beaumont Investment, Ltd*, 111 Cal. App. 4th at 113, citing, *Dyna-Med, Inc. v. Fair Employment & Housing Comm.* 43 Cal. 3d at 1387. Board regulations pertaining to discovery must be read in concert with each other. We believe the Board so intended when the regulations were first drafted. Our research finds nothing in the rulemaking file for the 1999 amendment to section 372 that persuades us the amendment was intended to change the inter-relationship between the regulations. Consistent with our understanding, *California Pipe Line, supra*,⁴ which was decided after the amendment was made, also viewed the regulations to be inter-connected.

In further support of our conclusion, we note that Board Rule, section 372.6, Proceedings to Compel Discovery, states that a party claiming non-compliance with a request for a witness list made pursuant to section 372 may file a motion to compel discovery. Because section 372.6 explicitly refers to requests for witness lists as “discovery,” we can find no logical basis on which to conclude that section 372.7’s requirement that surprise be shown before sanctions may be imposed for discovery abuses does not pertain to a failure to comply with section 372’s witness list requirement. It is no accident that the section numbers pertaining to witness lists, motions to compel discovery and discovery abuses are part of a series that all begin with “372.” We find the regulatory language clear and unambiguous: failure to comply with discovery requests may result in sanctions *upon a showing of surprise*.

A claim of “surprise” must be substantiated by facts and must be evaluated on a case by case basis. Any witness, be it the Employer’s witnesses or the Division’s witnesses, including the CSHO, may potentially surprise the opposing party.

Where surprise is shown, it is equally important to impose the appropriate sanction for the circumstances at issue. California Code of Civil Procedure section 2023.030, while not applicable here still serves as a guideline. Section 2023.030 allows courts to impose sanctions for discovery abuses and affords trial judges significant discretion in determining what sanction to impose. Nonetheless, the courts have held that this discretion is

⁴ In addition, see, *Tri-City Reinforcing Corp.*, Cal/OSHA App. 93-3101, Decision After Reconsideration (June 30, 1999), *F.W. Spencer and Son, Inc.*, Cal/OSHA App. 94-407, Decision After Reconsideration (May 10, 1999); see also, *MV Transportation, Inc.* Cal/OSHA App. 02-2930 (Jan 21, 2005), which failed to explicitly mention the need to show surprise but which referenced section 372.7 as the authority for imposing sanctions when a witness list is not produced.

not unbridled. *Puritan Ins. Co. v. Superior Court (Tri-C Mach. Corp.)* (1985) 171 Cal. App. 3d 877.)⁵

The courts have found that the judge's action must be just, and that the sanction imposed should be commensurate with the dereliction at issue. *Id.* The sanction should not exceed the level required to protect the interests of the party denied discovery and should not put the party in a better position than it would have been in had it obtained the discovery sought. *Id.* If, for instance, a party fails to produce a witness list as requested, but the requesting party is only able to show surprise that one of the three witnesses was to testify, the ALJ should consider this totality in fashioning the proper sanction. See, *F. W. Spencer & Son, Inc.*, Cal/OSHA App. 94-407, Decision After Reconsideration (May 10, 1999).

Dismissal or its functional equivalent is considered a drastic measure under California Code of Civil Procedure section 2023.030. *Id.*; *Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal. App. 3d 1579. Because California Code of Civil Procedure section 2023.030 serves the same purpose as section 372.7 of the Board's regulations, dismissal of citations issued by the Division, or dismissal of appeals by Employers, should be imposed only when the ALJ determines that the non-complying party's conduct warrants such an extreme sanction. We hold that an ALJ must examine the specific facts of each case and fashion the appropriate sanction in light of the totality of the circumstances.

We now turn to the present case. Employer made a motion at the hearing to exclude all Division witnesses, including the CSHO, because the Division failed to produce the witness lists requested. In this case, as in *F. W. Spencer, supra*, Employer acknowledged that "we had a good idea who the compliance officer was" and it provided no evidence that it was surprised that the CSHO would testify. Indeed, Employer's representative appears regularly before this Board and knows that the Division's CSHOs almost always testify. Employer moved to preclude the Division's CSHO simply because he was not disclosed as a witness in response to a discovery request. While the Division's failure to produce the list was improper, without a demonstration of surprise, it does not justify dismissal of the citations. If surprise had been shown, the ALJ would have needed to consider the totality of the circumstances to establish the proper sanction.

The ALJ granted Employer's motion based on his understanding of existing Board precedent, specifically *Donald B. Murphy, supra*, and its incorrect interpretation of *California Pipe Line, supra*. As noted above, we have

⁵ We affirm the Board's determination in *California Pipe Line, supra*, that a continuance is an inappropriate means to remedy any surprise that a party may experience as a result of another party's failure to comply with a discovery request. Non-compliance with a discovery request is not one of the grounds under which a continuance may be entertained once a hearing has begun under Board Rule section 376.1(f).

now disapproved *Murphy*, in part, because it misinterpreted prior decisions.

Under our current holding, as well as under Board precedent prior to *Murphy, supra*, we find that the facts of this case contain no evidence that Employer was surprised by the Division's witness. As a result, we see no basis on which to justify the imposition of sanctions.

DECISION AFTER RECONSIDERATION AND ORDER OF REMAND

The ALJ's decision in this proceeding is overruled. The case is returned to the hearing operations unit of the Board for further disposition by a full hearing on all issues.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: September 12, 2008