

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

In the Matter of the Appeal of:

FEDEX GROUND
1000 FedEx Drive
Moon Township, PA 15108

Employer

Docket. 13-R3D1-1220

**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 by the Division of Occupational Safety and Health, Department of Industrial Relations (Division) under submission, renders the following decision after reconsideration.

JURISDICTION

On March 14, 2013, the Division issued a citation to FedEx Ground (Employer) for a serious violation of section 3999(b) [failure to guard a belt conveyor system].¹ Employer filed an appeal of the citation and asserted affirmative defenses.

A Prehearing Conference was held on November 12, 2013, which was attended by representatives of both the Division and Employer. Subsequently, a further Prehearing Conference was scheduled for March 3, 2014.

On January 13, 2014, Employer served the Division with a set of Interrogatories and a set of Requests for Admissions.² The Division never responded to either of these discovery devices.

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

² The documents are respectively titled "Respondent's First Set of Interrogatories to District" (hereinafter Interrogatories), and "Respondent's First Set of Requests for Admissions to District" (hereinafter Requests for Admissions).

A further Prehearing Conference was held on March 3, 2014, which was attended by representatives of both the Division and Employer. Again, no disposition was reached, nor any hearings set. The ALJ's comments regarding the conference state: "More discovery required—DOSH request (sic) more time to respond to interrogatories. Parties will meet informally trying to avoid the scheduling of depositions." A further Prehearing Conference was scheduled for April 21, 2014.

On April 21, 2014, the parties again participated in a Prehearing Conference before the Board. During that conference, the Parties discussed the status of discovery, and the ALJ was advised that the Division failed to respond to Employer's Requests for Admissions and Interrogatories. The ALJ *sua sponte* ordered the Division to comply with Employer's Requests for Admissions and Interrogatories by no later than June 16, 2014, as noted in an Order dated May 7, 2014.³

On May 19, 2014, the Division filed a "Motion That ALJ Rescind Discovery Order," requesting that the ALJ withdraw its order compelling responses to the Interrogatories and Requests for Admissions. On May 27, 2014, Employer filed an Opposition to the motion.

On June 10, 2014, the ALJ denied the Division's "Motion That ALJ Rescind Discovery Order," and ordered the Division to respond to the aforementioned discovery.

On June 24, 2014,⁴ the Division filed a Petition for Reconsideration before the Board, requesting that the Board rescind the ALJ's order compelling responses to Interrogatories and Requests for Admissions. Employer filed an Opposition to the Division's Petition for Reconsideration.

ISSUES

- 1) May the Board Consider the Division's Interlocutory Petition for Reconsideration?**
- 2) Did the ALJ Properly Order the Division to Respond to Employer's Interrogatories and Requests for Admissions?**

³ We note that both Government Code section 11507.7 and section 372.6 contemplate that a motion to compel discovery be filed prior to the ALJ's issuance of an Order compelling discovery. There are also time limits for such a motion. However, we have no record of any motion to compel discovery filed by the Employer. Further, Employer's opposition papers admit that the ALJ acted *sua sponte*. (Employer's Opp. To Petition For Reconsideration, p. 2.) However, we need not decide whether the ALJ's *sua sponte* order requiring discovery responses was appropriate as the issue has not been raised within the Division's petition. The Division waived all challenges that are not specifically included within its Petition for Reconsideration. (Labor Code sections 6616, 6618.)

⁴ The Division's Petition appears to have been served by fax on June 24, 2014. But, it appears that the hard copy was not received until June 27, 2014.

EVIDENCE

On January 13, 2014, Employer issued twenty-four interrogatories to the Division. In summary, the interrogatories variously require the Division to provide all facts, identify all documents, and identify all witnesses relating to its issuance of the 3999(b) citation [failure to guard a belt conveyor system]. On the same day, Employer also issued twenty-two Requests for Admissions, requesting that the Division admit various facts, contentions, or statements concerning or relating to the Division's issuance of the 3999(b) citation.

Employer posits that the issuance of interrogatories and requests for admissions were necessary and appropriate in this case for multiple reasons, including the following:

First, this case also involves sixteen affirmative defenses, all of which appear to be disputed by the Division, and most of which are not addressed at all in the Division's file. Second, the facts are so complex in this case that the parties are unable to agree on even the most basic factual contentions; e.g. the precise location of the violative condition, the type of conveyor roller at issue, whether the roller requires a guard under the regulation, the direction the conveyor belt was moving, the size of the gap between the guard and the conveyor belt, and whether an industry standard is relevant to evaluating the guard at issue. These facts are also not addressed by the Division's file. Third, the case is complex because conveyor belts are specialized equipment, and the Division's standard does not specify guarding requirements. Accordingly, this case will require expert testimony as to industry standards and technical questions about the equipment.

In these circumstances, when every fact and legal interpretation at issue in this case is in dispute, and those facts and interpretations are not clarified by the Division's file, so (sic) additional discovery is necessary and appropriate to help narrow the issues in dispute, to aid in settlement, and/or preserve judicial resources at a hearing. (Employer's Opp. To Petition For Reconsideration, p. 5.)

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire record in this proceeding. The Board has taken no new evidence.

A. The Board May Consider This Interlocutory Order.

Preliminarily, the Board notes that an Order compelling the Division to respond to Interrogatories and Requests for Admissions 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[.]’” (*Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013), *citing*, *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.)

“[B]oard precedent holds that reconsideration will not be granted concerning interlocutory rulings, reasoning that they are not ‘final’ orders with the meaning of the Labor Code section 6614.” (*Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013), *citing*, *Inglewood Parks & Recreation*, Cal/OSHA App. 08-4182, Denial of Petition for Reconsideration (Mar. 4, 2010).) However, the Board has recognized that there are exceptions to this rule, which do allow appeals of interlocutory orders, “such as those involving questions of law, orders which are effectively final regarding issues independent of a case’s merits, or matters which are final as to a particular person.” (*Ibid.*) In deciding whether to grant an interlocutory order, the Board may consider “general principles” “followed by the courts” that allow for interlocutory review. (*See, Muse Trucking Company*, Cal/OSHA App. 03-4535, Denial of Petition for Reconsideration (Dec. 24, 2004).)

Here, the ALJ’s discovery ruling, which requires the Division to provide responses to Employer’s Interrogatories and Requests for Admissions, does not concern any final determination of the rights of the parties. Thus, the Petition unquestionably challenges an interlocutory ruling by the ALJ. And, reconsideration based upon an interlocutory order that does not dispose of all issues raised in the matter is viewed with disfavor since it allows for piecemeal litigation. (*Muse Trucking Company*, Cal/OSHA App. 03-4535, Denial of Petition for Reconsideration (Dec. 24, 2004.); *citing*, *Affordable Housing Corporation*, Cal/OSHA App. 80-937, Denial of Petition for Reconsideration (Sep. 4, 1984).) But, the immediate case falls within exceptions, long recognized by civil courts, which allow for interlocutory review.

In *Oceanside Union School Dist. v. Superior Court of San Diego County*, (1962) 58 Cal. 2d 180, the California Supreme Court held that review of an interlocutory discovery order is permissible where necessary to answer a question of first impression of general importance to the trial courts and the legal profession, particularly where guidelines established will be of great benefit to future cases. (*Id.* at 185, fn. 4; *see also*, *Toshiba America Electronic Components v. Superior Court*, (2004) 124 Cal. App. 4th 762, 767.) Additionally, extraordinary review may be granted when a discovery ruling plainly threatens immediate harm, such as loss of a privilege against

disclosure, for which there is no other adequate remedy. (*See, O'Grady v. Superior Court*, (2006) 139 Cal. App. 4th 1423, 1439.)

The aforementioned authorities justify the Board's consideration of the Division's interlocutory petition. The petition raises novel issues of first impression. This Board has not ruled upon whether, and to what extent, Interrogatories and Requests for Admissions are permissible in proceedings before it, and the resolution of this issue is sufficiently important to require the Board to address it, and establish guidelines for future cases. In addition, should the Division be required to respond to the aforementioned discovery requests without objection, important privileges could be lost—including the attorney-client privilege—for which there is no adequate remedy.⁵ Accordingly we find that review of this interlocutory discovery order is permissible and appropriate.

B. The ALJ Improvidently Ordered the Division to Respond to Employer's Interrogatories and Requests for Admissions.

Written discovery requests in Board proceedings are governed by a detailed statutory and regulatory scheme, which define the parameters and scope of permissible discovery.

1. Statutes and Regulations Governing Discovery In Board Proceedings.

Excluding subpoenas and depositions,⁶ written discovery in Board proceedings is governed by Labor Code section 6603, Government Code section 11507.6, and Cal. Code Regs., tit. 8, sections 372 and 372.1.

Labor Code section 6603 requires that the Board's rule of practice and procedure be consistent with Government Code section 11507.6. And, section 11507.6 defines the extent of permissible written discovery for Board proceedings as follows:

After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written

⁵ The ALJ's Order requiring the Division to provide response to the discovery requests does not state that the Division may assert objections within those responses, and Employer is likely to argue that the Division waived any objections by failing to assert timely objections and/or provide timely responses. As a result, the order compelling responses to the discovery requests may conceivably be construed to require the disclosure of information that would otherwise be privileged from disclosure, including on the basis of the work-product privilege or the attorney-client privilege. As we read the Interrogatories and Requests for Admissions, including their definitions and subparts, the requests may be construed to call for some otherwise privileged information. Should such a disclosure of privileged information occur, there would be no adequate remedy for the Division.

⁶ The discussion in this Decision does not encompass subpoenas or depositions, which are governed, respectively, by Cal. Code Regs., tit. 8, sections 372.2 and 372.3. (*See also*, Labor Code section 6613.) This discussion also does not contemplate evidence by affidavit or declaration. (Section 372.4.)

request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain 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, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to this person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of these oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

Further, in compliance with Labor Code section 6603 and Government Code section 11507.6, the Board adopted section 372 and 372.1 to govern discovery in Board proceedings. Regulation 372 states:

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 unsafeness 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.

Regulation 372.1 states:

After initiation of a proceeding and prior to the hearing, a party, upon written request made to another party, is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

- (a) Any statements of parties or witnesses relating to the subject matter of the proceeding;
- (b) All writings or things which the party then proposes to offer in evidence;
- (c) Any other writing or thing which is relevant and which would be admissible in evidence;
- (d) Inspection and investigative reports made by or on behalf of the Division or other party pertaining to the subject matter of the proceeding, to the extent that such reports
 - (1) Contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis of the proceeding, or
 - (2) Reflect matters perceived by the Division in the course of its inspection, investigation or survey, or

(3) Contain or include by attachment any statement or writing described in (a) to (c), inclusive, or summary thereof.

(e) For the purpose of this section, "statements" include written statements by the person, signed or otherwise authenticated, stenographic, mechanical, electrical or other recordings or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

(f) Nothing in this Section requires the disclosure of the identity of a person who submitted a complaint regarding an unsafe condition in an employment or place of employment unless that person requests otherwise. Nothing in this section authorizes the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as attorney's work product.

(g) Parties shall arrange a mutually convenient time for inspecting and copying the writings or things within 30 days of service of the written request. Unless other arrangements are made, the party requesting the writings must pay for the copying.

(h) Within 30 days of service of the written request, a party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefor.

2. Rules of Statutory and Regulatory Construction.

As discussed in *Central Chevrolet*, Cal./OSHA App. 05-2615, Denial of Petition for Reconsideration (Sept. 12, 2008):

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.

Further, in the construction of a statute, the office of the Board is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted. (See *e.g.*, *City of Long Beach v. Workers' Comp. Appeals Bd.*, (2005) 126 Cal. App. 4th 298, 312.)

3. The Statutes and Regulations Governing Written Discovery In Board Proceedings Do Not Specifically Permit Requests for Admissions or Interrogatories.

The plain wording of the statutes and regulations merely provides for two general types of written discovery: 1) a “written request” for specified witness information; and 2) a “written request” for production of specific categories of documents enumerated by regulation and statute. (See, Cal. Code Regs., tit. 8, sections 372 and 372.1; Labor Code section 6603; Government Code section 11507.6.) With regard to witness information, the statutes and regulations state that upon “written request” a party is entitled to obtain “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. (Section 372; Labor Code section 6603; Government Code section 11507.6.) With regard to production of documents, the statutes and regulations delineate specific categories of documents that may be sought on “written request,” and which must be produced in response to the request. (Section 372.1; Labor Code section 6603; Government Code section 11507.6.) These documents include, for example: “Any statements of parties or witnesses relating to the subject matter of the proceeding;” “All writings or things which the party then proposes to offer in evidence;” and, “Any other writing or thing which is relevant and which would be admissible in evidence.” (See, section 372.1.)

The statutes and regulations governing discovery proceedings in Board matters do not mention, nor do they contemplate, the issuance of Interrogatories or Requests for Admissions. And we decline to read into the statute and regulations discovery devices that do not exist, and that are not contemplated. (See, *City of Long Beach v. Workers' Comp. Appeals Bd.*, (2005) 126 Cal. App. 4th 298, 312.) Contrary to the suggestion of the Employer, the Board looks to the Code of Civil Procedure for guidance, but it does not look to the Code of Civil Procedure as a source of new discovery rules. (See, *Central Chevrolet*, Cal/OSHA App. 05-2615, Decision After Reconsideration and Order of Remand (Sep. 12, 2008).)

Next, while we can envisage circumstances where the issuance of usage of Requests for Admissions and Interrogatories would provide certain efficiencies in complex cases, such as narrowing the issues in dispute and reducing costs, we find, on balance, that allowing interrogatories and requests for admissions would be antithetical to the Board's attempts to keep proceedings "simple and informal." (*C.C. Myers*, Cal/OSHA App. 00-008, Decision After Reconsideration (Apr. 13, 2001)—"The Appeals Board attempts to keep its rules simple and informal.")⁷ The Appeals Board attempts to keep things simple and informal so that legal representation is not uniformly required in order to participate in its proceedings. Application of the written discovery devices contained in the Civil Discovery Act, and particularly those found in Code of Civil Procedure sections 2030.010 *et seq.* (pertaining to interrogatories) and 2033.010 *et seq.* (pertaining to requests for admissions), would significantly and unnecessarily complicate Board proceedings. Consequently, the Board reverses the decision of the ALJ requiring the Division to respond to all of Employer's Requests for Admissions and Interrogatories.

However, this ruling does not mean that a document may be ignored simply because of its title. We note that neither the statutes nor the regulations specifically identify the form that a "written request" must take. Therefore, a "written request" cannot simply be ignored because it is called an Interrogatory or a Request for Admission. The title of the written request is not dispositive. A party must respond to a discovery request, regardless of its title, to the extent the request can reasonably be construed as seeking the witness information and/or the types of documents enumerated by regulation and statute within Cal. Code Regs., tit. 8, sections 372 and 372.1, and Government Code section 11507.6. But, in no event, can any "written request" require the production of information or documents in excess of the categories of

⁷ Of course, the degree of simplicity and informality is limited by the requirements of Government and Labor Code sections that govern administrative hearings, fair hearing and due process constraints, and the requirements of regulations governing Board proceedings. *Helical Products Company, Inc.*, Cal/OSHA App. 99-2284, Denial of Petition for Reconsideration (Aug. 25, 2000.)

information and documents enumerated by the aforementioned statutes and regulations.⁸

This matter is remanded back to hearing operations for the further proceedings consistent with the guidance provided herein.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

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⁸ Additionally, we observe that the statutes and regulations governing written discovery do not contemplate verifications.