

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

In the Matter of the Appeal of:

KELLY SERVICES, INC.  
5200 N. Palm Avenue  
Fresno, CA 93704

Employer

Docket. 13-R2D5-1519

**DENIAL OF PETITION  
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by the California Division of Occupational Safety and Health (Division).

**JURISDICTION**

Commencing on October 19, 2012, the Division commenced an inspection of a place of employment in California maintained by Kelly Services, Inc. (Employer).

On April 18, 2013, the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed pre-hearing conference on September 30, 2013. After that pre-hearing conference this matter was duly-noticed for hearing.

On November 22, 2013 the Division moved to consolidate the hearing in this matter with the hearings of the appeals of two other employers arising

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

from the same incident which gave rise to the citations issued to Employer.<sup>2</sup> All three employers filed oppositions to the Division's motion to consolidate, and the Division filed a reply brief.

On February 3, 2014 the ALJ issued a Prehearing Order on Motion to Consolidate (Order) which denied the Division's motion.

The Division timely filed a petition for reconsideration.

Employer answered the petition.

### **ISSUE**

Does the record show the ALJ abused his discretion in denying the motion to consolidate?

### **REASON FOR DENIAL OF PETITION FOR RECONSIDERATION**

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

The Division petitions on the grounds that the Order was issued in excess of the ALJ's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Order.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

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<sup>2</sup> The other two matters are *John Bean Technologies Corp dba JBT Food Tech*, Docket numbers 13-R2D5-1632 and 1633; and *POM Wonderful*, docket numbers 13-R2D5-1515 and 1516. We are contemporaneously denying the Division's petition for reconsideration in these two cases as well.

Board Regulation section 363(b) provides that the Board “may” consolidate matters for hearing on its own motion or on motion of a party or parties. Labor Code section 15 provides that “may” is permissive. We therefore review the Order using the abuse of discretion standard.

From the record it does not appear that the ALJ abused his discretion in denying the Division’s motion to consolidate. The ALJ found that the facts and circumstances of the three matters are not sufficiently similar to warrant consolidation, and that consolidation will not promote judicial efficiency. Based on the evidence before the Board, we cannot say that the ALJ abused his discretion in ruling against the motion. There can be no finding of abuse of discretion unless it appears there was no reasonable basis for the tribunal’s decision. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

The Division’s petition for reconsideration argues that the Order is not interlocutory. Although the Board has consistently declined to grant reconsideration of interlocutory orders (see *Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782 Decision After Reconsideration (Dec. 9, 2013)), in view of the record showing that the ALJ has not abused his discretion in denying the Division’s motion we need not reach the question of whether the petition seeks review of an interlocutory order.

**DECISION**

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MARCH 28, 2014