

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

In the Matter of the Appeal of:

OC COMMUNICATIONS, INC
2204 Kausen Drive #100
Elk Grove, CA 95758

Employer

Dockets. 14-R2D2-0120, 0166 and 0340

**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 OC Communications, Inc. (Employer).

JURISDICTION

Commencing on September 24, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 3, 2014 the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board. On September 24, 2014 the Board sent notice to the parties that a mandatory in-person settlement conference (MSC) would be held on November 13, 2014 in Oakland, California. The MSC is part of a pilot project which the Board is conducting to assess the efficacy of holding MSCs as a means of improving its procedures and conserving the parties and its own resources by resolving cases more efficiently and narrowing the issues of cases which procedure through hearing.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

On October 22, 2014 Employer filed a motion to “cancel or vacate” the MSC.

On October 24, 2014, an ALJ issued an Order on Motion (Order) denying Employer’s motion without prejudice.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Was it correct to deny Employer’s motion?

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.

Employer’s petition does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.* Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) Construed in the light most favorable to Employer, the petition may be deemed to assert the Order was issued in excess of the ALJ’s powers.

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.

First, we note that Employer and the Division did in fact participate in the MSC as scheduled. Therefore, Employer's petition is moot and is denied on that basis.

Second, Employer's petition concerned an interlocutory order, and absent extraordinary circumstances we do not grant reconsideration of interlocutory orders. (Labor Code § 6614 [reconsideration is of final orders or decisions]; *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228); *Inglewood Parks & Recreation*, Cal/OSHA App. 08-4182, Denial of Petition for Reconsideration (Mar. 4, 2010.) An interlocutory order is one issued by a tribunal before a final determination of the rights of the parties is made. (*Gardner Trucking, Inc.*, Cal/OSHA App. 2012-0782, Denial of Petition for Reconsideration (Dec. 9, 2013).) The rule is that if anything further in the nature of judicial action by the court is essential to a final determination, the judgment is interlocutory. (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.) Here the MSC was intended to advance settlement and/or narrow the issues involved in the matter. None of the exceptions to the rule against reconsidering interlocutory orders apply here. (See, *Gardner Trucking, Inc.*, *supra.*)

Third, the Board regulations section 374.3 authorizes the Board to schedule a settlement conference and compel the parties to attend.

“Settlement Conference. The Appeals Board on its own motion, or upon written request of a party, may schedule a settlement conference to be held before an administrative law judge who shall not hear the appeal, unless otherwise stipulated by the parties. Each party shall attend or be represented by a person authorized to negotiate regarding settlement. The settlement conference may be conducted by means of a telephone conference call.”

The quoted text does not limit the scope of a conference should one be scheduled. Although attendance by phone “may” be allowed, the Board has the authority to require in-person attendance. Section 374.3 does not limit the scope of the matters which may be covered or considered during such a conference.

Additionally Employer argued in its petition that the ALJ erred in construing its motion as a motion to continue, applying the good cause standard established by the Board to the motion, and denying it on that basis. Regardless of the rationale advanced by the ALJ, the effect of the Order was to deny Employer's motion to cancel the MSC, and since the Board must address whether that denial was proper, doing so will cure any defect in terminology which may exist. (*Alzate Building Corporation*, Cal/OSHA App. 2010-9257, Denial of Petition for Reconsideration (Feb. 8, 2011), citing *People v. Smithey* (1999) 20 Cal.4th 936, 972 [“[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon

any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.”.)

Finally, Employer argues that “certain of these topics [required to be covered in the MSC] have no relationship to the intended MSC and, as such, denies due process of law to [Employer].” Employer cites no authority for the proposition that requiring it to attend the MSC and deal with the several topics to be addressed in it results in a denial of due process. Nor is that assertion clear as to its point. It is assumed for present purposes that Employer contends that requiring it to discuss topics not specifically mentioned in a Board regulation denies it due process. Board regulation section 350.1(a) authorizes ALJs, among other powers, “to request a party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, . . . or to take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, status conference, or settlement conference, that is deemed appropriate by the [ALJ][.]” Accordingly, due process is satisfied by section 350.1(a) which authorizes ALJs to regulate the course of a proceeding.

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
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