BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1523238**
ORANGE COUNTY FIRE AUTHORITY **1 Fire Authority Road** **Irvine, CA 92602** **Employer**	**DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

On July 2, 2021, the Division issued five citations to Orange County Fire Authority (Employer), totaling $90,500.00 in proposed penalties. Citation 1, Item 1, alleged a Serious violation of California Code of Regulations, title 8,[1] section 3203 [Injury and Illness Prevention Program]. Citation 2, Item 1, alleged a Serious violation of Section 3410, subdivision (a) [Wildland Fire Fighting Requirements, Head Protection]. Citation 3, Item 1, alleged a Serious violation of Section 3410, subdivision (b) [Wildland Fire Fighting Requirements, Eye Protection]. Citation 4, Item 1, alleged a Serious, Accident-Related violation of Section 3410, subdivision (c) [Wildland Fire Fighting Requirements, Thermal Protection of Ears and Neck]. Citation 5, Item 1, alleged a Serious violation of Section 3410, subdivision (e) [Wildland Fire Fighting Requirements, Hand and Wrist Protection].

Employer filed a timely appeal of the citations, contesting the existence of the violations, the classification, and the reasonableness of the penalties for all citations. Employer also asserted a series of affirmative defenses for each of the citations. A hearing was scheduled to commence on July 30, 2024.

On June 5, 2024, Administrative Law Judge (ALJ) Mario L. Grimm issued an order calling for prehearing statements from each party. The order included the following instructions:

> The prehearing statement shall identify the party's position regarding each citation and all issues in dispute (whether factual or legal). For each citation, the party shall state its position regarding each element of the following: (1) Labor Code section 6432, subdivision (c); and (2) the Independent Employee Action Defense.

[1] Unless otherwise specified, references are to California Code of Regulations, title 8.

> For each citation, Orange County Fire Authority shall identify each affirmative defense that it will raise at hearing.

Both Employer, represented by attorneys Kevin D. Bland and Jennifer Yanni, of Ogletree, Deakins, Nash and Smoak, and the Division, represented by Rocio Garcia-Reyes and Melissa L. Viramontes, filed timely prehearing statements. However, Employer's prehearing statement did not state its position regarding each element of the burden shifting analysis set forth in Labor Code section 6432, subdivision (c), nor did it address the elements of the IEAD. On July 24, 2024, shortly before the hearing, ALJ Grimm issued an Order which stated:

> The Appeals Board issued an Order dated June 5, 2024 (the Order), requiring each party to submit a prehearing statement that addresses the elements of the following two affirmative defenses: (1) the defense contemplated in Labor Code section 6432, subdivision (c), which is commonly referred to as the Lack of Employer Knowledge Defense; and (2) the Independent Employee Action Defense.
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> Orange County Fire Authority (Employer) filed a prehearing statement that does not address the elements of these two affirmative defenses. Accordingly, these two affirmative defenses are deemed waived and Employer shall not be permitted to assert these affirmative defenses at hearing. [2]

The next day, Employer filed a Petition for Reconsideration (Petition) and a Motion for Continuance of Hearing (Motion). The Motion for continuance was granted. The Board took the Petition under submission.[3]

Employer's Petition makes several arguments. First, Employer argues that the Board's regulations do not authorize the ALJ to issue an order directing it to "establish its affirmative defenses in advance of the hearing nor . . . obligate the Employer to prove each and every element of the defenses when no evidence has yet been introduced." (Petition, p. 6, citing to § 361.3, subd. (b)(2).) Employer argues that it properly and timely asserted its affirmative defenses and the ALJ erred by deeming them waived. (Petition, pp. 6-9, citing to § 361.3, subd. (b)(2).) Second, Employer argues that even assuming the ALJ could order such a prehearing statement, the ALJ did not have authority to deem its affirmative defenses waived when it failed to comply with the

[2] Although the ALJ's order characterized Employer's burden under Labor Code section 6432 as an affirmative defense, the current version of the statute, by its plain terms, is better understood as setting forth a burden shifting analysis. The Division holds the initial burden. The Division establishes a rebuttable presumption of a Serious violation if it establishes a realistic possibility that serious physical harm could result from the actual hazard created by the violation. Employer, in turn, may rebut that presumption if it establishes the elements set forth in Labor Code section 6432, subdivision (c). We do, however, note that, when analyzing an earlier version of the statute, the Board often referred to Employer's burden as the lack of employer knowledge defense.

[3] Notwithstanding its interlocutory nature, the Board granted the Petition. The Board's decision to grant interlocutory review was appropriate. The issues addressed in the petition are one of first impression and are of general importance to the legal community. (*Adept Process Service*, Cal/OSHA App. 1570353, Decision After Reconsideration (April 24, 2023).) They also threaten immediate harm, for which there is no other adequate remedy. (*FedEx Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sept. 17, 2014).)

ALJ's order. (Petition, p. 6.) Third, Employer argues that the ALJ's order is a form of terminating sanctions, which should be reserved for only the most flagrant of violations, and such terminating sanctions are not warranted here. (Petition, pp. 4-6.)

In making this decision, the Board has engaged in an independent review of this matter. The Board additionally considered the pleadings and arguments filed by the parties.

ISSUES

1) Did the ALJ have authority to direct the parties to provide a prehearing conference statement addressing their position on the elements of Labor Code section 6432, subdivision (c), and the IEAD?

2) Does the ALJ have the authority to prevent Employer, at hearing, from relying on Labor Code section 6432, subdivision (c), to rebut the presumption of a Serious violation, or from asserting the IEAD when Employer violates the ALJ's order?

3) Were the sanctions appropriate in this case?

FINDINGS OF FACT

1) Employer was not given adequate notice and an opportunity to be heard prior to the imposition of issue preclusion sanctions.

DECISION AFTER RECONSIDERATION

1) Did the ALJ have authority to direct the parties to provide a prehearing conference statement addressing their position on the elements of Labor Code section 6432, subdivision (c), and the IEAD?

The first argument that we must address is whether the ALJ exceeded his authority when in his June 5, 2024 order, he directed each of the parties to "state its position" on whether Employer can rebut the presumption of a Serious violation under Labor Code section 6432, subdivision (c), or prove the IEAD.

Notably, Employer did not raise any timely challenge before the ALJ relating to the June 5, 2024, order calling for prehearing statements. Instead, Employer's Petition offers only a *post hoc* rationalization for its failure to comply with that order. Employer's Petition argues that the ALJ's order essentially required it to establish its affirmative defenses in advance of the hearing, which Employer argues violates the Board's operative regulations. (Petition, p. 6-9, citing to §361.3, subd. (b)(2).) Employer states that the ALJ does not have authority to require it "prove each and every element of the defenses when no evidence has yet been introduced." (Petition, p. 6.) Employer further asserts,

> The idea that requiring a party to establish the elements of an affirmative defense prior to the start of the hearing is baffling. In the interest of judicial expediency and not wasting time during the

> hearing, one would assume that an ALJ would be more apt to rely on evidence obtained during the hearing rather than vague assertions made beforehand that may or may never be substantiated during the hearing. Indeed, the Order renders the evidentiary hearing unnecessary if the issues can be decided on the merits before evidence has been introduced and testimony has been elicited.
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> (Petition, p. 8.)

As a preliminary matter, we are skeptical of Employer's *post hoc* rationalization for its failure to comply with the ALJ's order. If Employer was genuinely confused about the scope of the ALJ's order or believed it unlawful, it could have sought clarification or raised an objection before the ALJ. However, what Employer did instead was submit no response whatsoever to several portions of the ALJ's order.

Turning to the merits of Employer's argument, we believe that Employer's Petition exaggerates and distorts the contents of the ALJ's June 5, 2024, order. The ALJ's order did not direct Employer to establish and prove each element necessary to rebut the presumption of a Serious violation or prove the IEAD; the order did not ask for proof or evidence of any kind. Rather, the order merely directed the parties, for each citation, to state their "position regarding each element" of these two issues. A short and plain statement describing whether, and why, Employer believed it could (or could not) establish the identified elements would have been sufficient. Indeed, the Division provided a prehearing conference statement that provided as little as two sentences on multiple IEAD elements, which the ALJ accepted without comment.

The ALJ acted squarely within his authority when he issued the challenged order. There are multiple regulations that authorize the challenged order. Most notably, section 350.1, subdivision (a), states the following:

> In any proceeding assigned for hearing and decision under the provisions of Labor Code Sections 6604 and 6605, an Administrative Law Judge shall have full power, jurisdiction and authority . . . <u>to request a party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding</u> . . . or 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 Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act. [<u>Underline added</u>.]

Next, section 374, subdivision (b), governing prehearing conferences states, "Each party to a prehearing conference shall be prepared to discuss the issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence … <u>and to do such other things as may aid in the disposition of the proceeding</u>. [<u>Underline added</u>.]" Finally, we observe that the ordered prehearing conference statement would fall within the scope of the ALJ's discretion, under section 380, subdivision (d),

"to require pre-hearing briefs when briefing would assist the Administrative Law Judge and the parties in identifying or clarifying issues for the hearing or other issues arising before the hearing."

Therefore, we conclude that the ALJ did have authority to direct the parties to provide a prehearing conference statement addressing their position on the elements of Labor Code section 6432, subdivision (c), and the IEAD.

2) Does the ALJ have the authority to prevent Employer, at hearing, from relying on Labor Code section 6432, subdivision (c), to rebut the presumption of a Serious violation, or from asserting the IEAD when Employer violates the ALJ's order?

The ALJ's July 24, 2024, order stated that Employer can neither rebut the presumption of a Serious violation under Labor Code section 6432, subdivision (c), nor prove the IEAD. Specifically, the ALJ's order held that, "these two affirmative defenses are deemed waived and Employer shall not be permitted to assert these affirmative defenses at hearing." Employer's Petition argues that the ALJ does not have authority to issue such a ruling. Employer's Petition states, "the Order is tantamount to a dispositive ruling in that it has precluded the Employer from presenting evidence in support of defenses that would dispose of certain issues and/or citations. Yet, Title 8 makes no allowance for dispositive motions; as such, it would stand to reason to reason that a dispositive ruling is similarly in violation of Title 8." (Petition, p. 6.)

To address Employer's challenge, we first consider whether an ALJ, in general, has authority to issue the type of sanctions at issue here. In the next section, assuming such authority does exist, we consider whether that authority was appropriately exercised in this particular case.

Without reaching the question of whether the ALJs order was appropriate in this case, we conclude that our regulations provide the ALJs broad authority to issue a range of sanctions for the failure to obey a lawful order. Section 381 states:

> (a) If any person in proceedings before the Appeals Board disobeys or resists any lawful order or refuses, without substantial justification, to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceedings, the Administrative Law Judge or the Appeals Board may, on its own motion or the motion of a party:
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> (1) Certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code Section 11455.20;
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> (2) Exclude the person from the hearing room;
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> (3) Prohibit the person from testifying or introducing designated matters in evidence;

> (4) Establish designated facts, claims, or defenses if the person is a party;
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> (5) Grant the appeal without further proceedings if the person is a representative of the Division; or
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> (6) Dismiss the appeal without further proceedings if the person is the Employer or a representative of the Employer.

Section 381, even when considered alone, broadly authorizes an ALJ to issue an order preventing an employer from either rebutting the presumption of a Serious violation under Labor Code section 6432, subdivision (c), or proving the IEAD. Specifically, it provides that when a party disobeys or resists a lawful order without justification, the ALJ may preclude that party from offering evidence regarding specific matters. (§ 386, subd. (a)(3).) The ALJ may also establish certain designated facts against Employer. (§ 386, subd. (a)(4).)

Furthermore, Employer's actions here might also be construed as the failure to participate in a prehearing conference. The ALJs have broad authority to issue sanctions for the failure to properly participate in a prehearing conference. Section 372, subdivision (c), states:

> The failure of a party or its representative to prepare for and participate in the prehearing conference shall be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party.

Therefore, we conclude that the Board's regulations do broadly authorize the ALJ to issue the challenged July 24, 2024, order.

3) Were the sanctions appropriate in this case?

Even assuming the ALJ had authority to issue the order, Employer argues that the ordered sanctions were not appropriate in this case. Employer argues that the ALJ's order is a form of terminating sanctions, which should be reserved for only the most flagrant of violations. (Petition, pp. 4-6.) Employer cites to California appellate cases—typically involving discovery disputes—that suggest that lesser sanctions should be first imposed, and found wanting, before a court resorts to issue preclusion or terminating sanctions.[4] (Petition, pp. 4-6.) Employer's argument is well taken.

[4] Although the identified California case law is not directly applicable to Board proceedings, the Board does, on occasion, look to such case law for guidance, particularly when considering the propriety of certain sanctions. (*Preferred Framing*, Cal/OSHA App. 00-3419, Decision After Reconsideration (Dec. 24, 2002).)

California courts possess statutory authority to employ monetary sanctions for a violation of a court order, for discovery abuses, or other bad faith conduct. (See, e.g., Code Civ. Proc., §§ 128.5, 177.5, 2025.410, 2025.420, 2025.450.) Courts also have statutory authority to impose issue, evidence, or terminating sanctions. (See, e.g., Code Civ. Proc. § 2025.450, subd. (h).)

However, notwithstanding the authority to issue a variety of sanctions, California case law and statutes generally favor an incremental approach to sanctions, "starting with monetary sanctions and ending with ultimate sanction of termination." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) Courts have generally concluded that issue preclusion and terminating sanctions should be used sparingly, and only after other incremental approaches have failed. (See *J.W. v. Watchtower Bible & Tract Society of New York, Inc*. (2018) 29 Cal.App.5th 1142, 1169; *Maldonado v. Superior Court* (2002) 94 Cal. App. 4th 1390, 1398-1399.) Courts have held that "[s]anctions should be appropriate to the dereliction" and not serve as punishment. (See *J.W. v. Watchtower Bible & Tract Society of New York, Inc*., *supra*, 29 Cal.App.5th at 1169 [other citations omitted].) Courts consider the conduct being sanctioned and attempt to tailor the sanction to the harm. (*Ibid*.) "Although in extreme cases a court has the authority to order a terminating sanction as a first measure, a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective." (*Ibid*.) "A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc*. (2016) 246 Cal.App.4th 566, 604 [other citations omitted].)

While the foregoing authorities do not apply directly to Board proceedings, we find their overarching reasoning persuasive. Indeed, the rule that a sanction cannot go further than is necessary to accomplish the underlying purpose is rooted in constitutional due process. (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613–614.)

We also note that prior Board decisions have expressed reluctance to impose issue preclusion, witness exclusion, or terminating sanctions. (See, e.g., *Preferred Framing*, Cal/OSHA App. 00-3419, Decision After Reconsideration (Dec. 24, 2002); *Nolte Sheet Metal*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).) The Board has indicated that willful misconduct that denies a party a fair hearing may justify a harsh sanction. (*Preferred Framing*, *supra*, Cal/OSHA App. 00-3419.) However, an unintentional failure that does not deny a fair hearing constitutes a procedural error, but it does not justify a sanction of dismissal. (*Ibid*.)

Having considered the foregoing authorities, we now consider their application in this case. To begin, we disapprove of Employer's actions. Employer wrongfully failed to comply with the ALJ's order. Employer's counsel is admonished that better care must be taken to ensure compliance with the ALJ's orders.

However, drawing on guidance contained in California case law, we conclude that the Employer's failure here does not justify the relatively severe sanction imposed by the July 24, 2024, order. The sanction was not appropriately tailored to the dereliction. There is a strong public policy favoring disposition of matters on their merits. (*Webcor Builders*, *Inc*., Cal/OSHA App.

1416143, Decision After Reconsideration (May 23, 2022).) Absent extreme, outrageous, or willful conduct, a more incremental approach to sanctions is generally favored before depriving a party of the right to have their case heard on the merits.

Here, notwithstanding Employer's unpersuasive *post hoc* rationalization for its failure to comply with the ALJ's order, we are unable to conclude that there was a willful failure to comply with the order, nor any other extreme or outrageous conduct warranting the sanction that was issued. The ALJ, therefore, should have first attempted less severe alternatives and found them to be unsuccessful before resorting to stronger sanctions, such as precluding Employer from relying on Labor Code section 6432, subdivision (c), or the IEAD. For example, an admonishment, and an order to correct the issue, would likely have been sufficient to address any harm in this case, only followed by more severe sanctions if there was a subsequent dereliction. We therefore reverse the July, 24, 2024, order.

In addition, the July 24, 2024, order is reversed for a separate reason. Adequate notice and an opportunity to be heard prior to the issuance of a material sanction—e.g., terminating or issue preclusion sanctions—are mandated by the due process clauses of both the federal and state Constitutions. (See, e.g., *O'Brien v. Cseh* (1983) 148 Cal. App. 3d 957, 961-962 [negative treatment on other grounds].) Constitutional due process principles are offended by summary imposition of sanctions. (*Ibid*.) Accordingly, before issuing such sanctions, the ALJ should have provided Employer with notice and an opportunity to be heard, which did not occur here.

In reversing the July 24, 2024, order, we do not mean to suggest that it will never be appropriate for an ALJ to impose issue preclusion or terminating sanctions as a first resort. We merely hold that, in general, absent more extreme circumstances, we favor a more incremental approach to sanctions. Less severe alternatives should be utilized first, and found wanting, before the ALJ resorts to sanctions that may influence a disposition on the merits. We also note, however, that the policy favoring lesser sanctions should not be confused as an inflexible rule of law. We can envision more extreme circumstances (not present here) justifying issue preclusion or termination sanctions, even where lesser sanctions have not been first imposed.

DECISION

The Board reverses the Order of the ALJ and this matter is remanded for further proceedings consisent herewith.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 12/19/2024