BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **ADEPT PROCESS SERVICES, INC.** **16880 West Bernardo, Ste. 250** **San Diego, CA 92127** **Employer**	**Inspection No. 1570353** **DECISION AFTER RECONSIDERATION AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration and Order of Remand in the above-entitled matter.

JURISDICTION

Beginning December 28, 2021, the Division of Occupational Safety and Health (the Division), conducted an inspection of Adept Process Services, Inc. (Employer). The inspection arose out of an incident where the Division alleged an employee conducting "hot work" (i.e., welding or cutting) on a boat's fuel tank was fatally injured when the tank exploded.

On June 28, 2022, the Division issued five citations, alleging eight violations of California Code of Regulations, title 8.[1]

Employer, represented by attorney Manuel Melgoza of Donnell, Melgoza & Scates LLP, initiated a timely appeal of the citations. On August 17, 2022, the Appeals Board issued a notice to Employer informing it that the matter had been referred to the Division's Bureau of Investigation. The Notice stated, "On 08/17/2022, the Division of Occupational Safety and Health notified the California Occupational Safety and Health Appeals Board that it referred your case to its Bureau of Investigations (BOI) pursuant to California Code of Regulations, title 8, section 376, subdivision (c)[.]" Thereafter, for over a year, no activity occurred in this matter.

On September 20, 2022, Attorney George Rios (Mr. Rios) of Mulvaney, Barry, Beatty, Linn & Mayers LLP filed a motion for party status via letter. The letter stated,

> This law firm represents the interests of Kelly Seganti who is the surviving spouse of Jared Seganti, the deceased employee. Mr.

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

> Seganti's death prompted inspection number 1570353 which is now being appealed by the above-mentioned employer. Please allow this letter to serve as Mrs. Seganti's Motion for Party Status pursuant to C.C.R. §§ 354 and 371.

On September 23, 2022, Presiding Administrative Law Judge Sam Lucas denied the motion without prejudice, finding the Division had not been properly served with the motion.

On September 27, 2022, Mr. Rios refiled the motion for party status with a proof of service evidencing that all parties had been served by mail, fax, and email, including the Division.

On September 28, 2022, Employer filed a Motion for Stay. This motion requested that all motions be held, and not ruled upon, until the BOI closed its investigation. The motion also noted that there are related civil matters and stated,

> One of the civil litigants attempted to file a motion for party status, even though that person was not an employee of the cited employer and does not come within the definition of "affected employee," because he was an independent contractor and APS did not "assign him" any work duties. […] Thus, motions of this type, and subsequent motions, depositions, requests that we provide identification of witnesses, their addresses, etc., are likely to be filed and/or re-filed, causing Appellant to have to respond to each.
>
> Therefore, Appellant requests that this Board place this matter in abeyance and not entertain or rule upon any motions until the BOI matter is closed and released for administrative resolution.

On January 13, 2023, the Administrative Law Judge (ALJ), Rheeah Yoo Avelar, issued two orders both titled Order on Motion: (1) an order denying the motion to stay; and (2) an order granting third-party status. As to the order denying the motion to stay, the ALJ concluded section 376, subdivision (c), "requires delay of the hearing until the earlier of three years or the conclusion of BOI review, or the completion of a criminal prosecution; it does not otherwise limit the authority of the Appeals Board."

On January 18, 2023, Mr. Melgoza sent an email to the ALJ asserting he had never received the motion for third-party status, and argued the order should be rescinded. In response, the ALJ replied that Employer's motion had been accompanied by a verified proof of service, whereas Mr. Melgoza's email was not so verified. Rather than address the parties' conflicting allegations via email, the ALJ said, "Employer will need to take more formalized steps. A motion to stay and set aside the order granting third party status for failure to comply with section 371, with verified supporting declaration(s), would be appropriate." However, Employer filed no such motion.

On February 7, 2023, Employer filed an interlocutory Petition for Reconsideration (Petition) challenging both of the ALJ's orders, denying the stay and granting third party status. Employer's petition for reconsideration raises several issues.

Employer's Petition first argues that the ALJ's interpretation of section 376 is too narrow, and argues its motion for stay should have been granted, which would have stayed administrative proceedings in their entirety, and prevented consideration of any motions or issuance of discovery. Employer argues that the Board has historically interpreted section 376 more broadly. (Petition, pp. 3-5.) Employer states that "it should not be forced to choose between actively engaging in the administrative appeal process while simultaneously being investigated for criminal prosecution." (Petition, p. 6.) Employer's Petition additionally indicates its Fifth Amendment right against self-incrimination may be implicated if administrative proceedings, including motions and discovery, are not stayed. (Petition, pp. 7-8 [Declaration].)

Second, the Petition states, "Petitioner did not receive the motion in question, and had no opportunity to respond. Petitioner has yet to receive a copy of the motion and the proof of service upon which Judge Avelar appears to have relied." (Petition, p. 3.)

Third, notwithstanding that the matter is proceeding before BOI, Employer argues that the order granting party status adversely resolved a factual issue on appeal, i.e., finding that the injured employee was an employee, not an independent contractor. Employer states, "the Order essentially determines the issue of responsibility finally and adversely toward Petitioner, a determination she is unlikely to reverse if and when she presides over the hearing on the merits." (Petition, p. 2.)

On February 16, 2023, Mr. Rios, counsel for Mrs. Seganti, filed an Answer to the Petition addressing many of Employer's arguments. In response, Employer filed an objection to the Answer, again asserting that Jared Seganti was an independent contractor, not an employee. Employer argues that Mrs. Seganti failed to establish any right to participate as a party in this proceeding. Employer also reasserted its argument that this matter should be stayed.

On March 16, 2023, Mr. Rios responded to Employer's objection by admitting that Mr. Seganti was never an employee of Employer, and that its earlier reference to him being as an employee was error. Mr. Rios requested that the order granting party status be reformulated to an order granting Mrs. Seganti intervenor status, pursuant to section 354.

ISSUES

1. **Should the Board grant interlocutory review of the Employer's petition for reconsideration?**

2. **After this matter was referred to BOI, did the ALJ err when she denied Employer's Motion for Stay?**

FINDINGS OF FACT

1. On June 28, 2022, the Division issued five citations, alleging eight violations of California Code of Regulations, title 8.

2. Employer initiated a timely appeal of the citations.

3. On August 17, 2022, the Appeals Board issued a Notice of BOI Status. The Notice stated, that the Appeals Board had been informed that the Division had referred this case to its BOI.

DISCUSSION

1. Should the Board grant interlocutory review of the Employer's petition for reconsideration?

Employer's Petition challenges two orders issued by the ALJ: (1) an order denying the motion to stay; and (2) an order granting third party status. We initially observe, however, that one such order has been rendered moot by subsequent proceedings. Mr. Rios, counsel for Mrs. Seganti, has admitted that Mr. Seganti was not an employee of Employer, and that the request for party status was in error. Therefore, the order granting party status is vacated,[2] leaving only the issue of whether this matter should be stayed.

The ALJ's order denying the request to stay is interlocutory in nature, meaning an order issued before a final determination of the rights of the parties has occurred. (*Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sept. 17, 2014), citing *Gardner Trucking, Inc*., Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013).) "[B]oard precedent holds that reconsideration will not be granted concerning interlocutory rulings, reasoning that they are not 'final' orders with the meaning of…Labor Code section 6614." (*Ibid*.)

However, the Board has recognized exceptions to this rule. (*Fedex Ground*, *supra*, Cal/OSHA App. 13-1220, citing *Muse Trucking Company*, *supra*, Cal/OSHA App. 03-4535.) In deciding whether to engage in interlocutory review, the Board has considered principles followed by the courts that allow for such review. (*Ibid*.) Courts have held that review of an interlocutory order may be appropriate where it concerns an issue of first impression of general importance to the legal profession, or where it may implicate a privilege. (See *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1031.)

Here, the predominant issue raised by Employer's petition for reconsideration is whether, and to what extent, Board proceedings must be stayed when a matter is referred to the BOI. For background, the BOI "may investigate those cases in which the bureau finds criminal violations

[2] We decline the invitation to reformulate the ALJ's order into an order granting intervenor status. Such a request must first be made before the ALJ via an appropriate motion.

may have occurred" and is "responsible for preparing cases for the purpose of prosecution[.]" (Lab. Code, § 6315, subd. (a).) Employer argues the text of section 376, subdivision (c), requires the Board to stay administrative proceedings in their entirety, not just the hearing. Employer also argues, "It should not be forced to choose between actively engaging in the administrative appeal process while simultaneously being investigated for criminal prosecution." (Petition, p. 6.) Employer asserts its fifth-amendment rights may be compromised if this matter is not stayed in its entirety. (*Id*. at p. 8.)

Because the Board has no recent decisions meaningfully analyzing or addressing Employer's assertion that Board proceedings must be stayed in their entirety when a matter is referred to the BOI, the Board concludes that interlocutory review of this particular issue is appropriate as a matter of general importance to the legal community.

2. After this matter was referred to BOI, did the ALJ err when she denied Employer's Motion for Stay?

Employer's Petition argues that its motion to stay should have been granted, and administrative proceedings stayed in their entirety, for two reasons: (1) based on the text of section 376, subdivision (c), including the Board's past interpretation of that section; and (2) based on its constitutional right against self-incrimination. We address each of Employer's arguments *seriatim*.

Section 376, subdivision (c):

When denying Employer's motion to stay, the ALJ held that section 376, subdivision (c), "requires delay of the hearing until the earlier of three years or the conclusion of BOI review, or the completion of a criminal prosecution; it does not otherwise limit the authority of the Appeals Board." Employer's Petition argues that the ALJ erred because section 376, subdivision (c), and the Board's prior interpretation of that section, required a complete stay of administrative proceedings, not just a delay of the hearing. For reasons addressed *infra*, we concur with the ALJ.

We first consider whether section 376, subdivision (c), mandates a complete stay of administrative proceedings, and not just a stay of the hearing. That section states,

> (c) When the Appeals Board is notified that a case is being reviewed by the Bureau of Investigations or any prosecuting authority, the Appeals Board shall delay the hearing until notified that review is concluded or for a period not exceeding three years, whichever occurs earlier. If the Appeals Board is notified that criminal charges have been filed, the Appeals Board shall subsequently extend the delay until completion of the criminal case, which shall be deemed to occur on the date of a verdict of not guilty, a dismissal of the case by a court, or the date of sentencing after a verdict or plea of guilty or no contest. The Appeals Board may also delay the case beyond three years from the date of the incident on the written request of a

> party or prosecuting authority if necessary to allow the Bureau of Investigations or any prosecuting authority to conclude its review or criminal prosecution of the case.

When analyzing section 376, subdivision (c), the Board employs the standard rules of regulatory construction. The Board must first look to the language of the regulation itself, which is generally the most reliable indicator of intent. (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 101; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54-55.) If terms in the regulation are undefined, the Board gives the terms their ordinary and usual meaning, and they should be construed in context.[3] (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 146; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 81-83.) However, a regulation may prescribe legal definitions for its terms, and those definitions are binding. (*City of Los Angeles v. City of Los Angeles Employee Relations Bd.* (2016) 7 Cal.App.5th 150, 163-164.)

The first sentence of section 376, subdivision (c), uses both the terms "case" and "hearing." It states that, "[w]hen the Appeals Board is notified that a case is being reviewed by the Bureau of Investigations or any prosecuting authority, the Appeals Board shall delay the hearing until notified that review is concluded or for a period not exceeding three years, whichever occurs earlier." (§ 376, subd. (c) [underlines added].) It can be presumed that these different words, used in the same enactment, have different meanings, particularly since one word is defined and the other is not. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117; see also *Barber v. State Personnel Bd*. (2019) 35 Cal. App. 5th 500, 513.) Section 347, subdivision (r), defines "hearing" to mean "any hearing before the Appeals Board or an Administrative Law Judge set for the purpose of receiving evidence." The word "case" has no special definition; therefore, we employ the ordinary meaning, which is, relevant here, "a suit or action in law or equity."[4]

Applying the rules of regulatory construction (and the aforementioned definitions for the words "case" and "hearing"), section 376, subdivision (c), does not, by its plain terms, mandate the delay of the entire "case;" it merely states that the Board "shall delay the hearing until notified that review is concluded or for a period not exceeding three years, whichever occurs earlier." (§ 376, subd. (c) [underline added].) Therefore, based on the plain text of section 376, subdivision (c), there is no error in the ALJ's order denying the motion for stay, which recognized the duty to delay the hearing, but otherwise denied Employer's motion to stay. The ALJ's order was consistent with the plain text of the regulation.

Employer argues that the Board has traditionally interpreted section 376 to require a complete stay of administrative proceedings. Employer supports it argument with *dicta* from

[3] Where a word of common usage has more than one meaning, the one which will best attain the purposes of the regulation should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted. (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 101.)

[4] Merriam-Webster Dictionary (online), <https://www.merriam-webster.com/dictionary/case> [accessed 3/17/2023]

several prior Board decisions. (See *Ultimate Construction*, Cal/OSHA App. 05-378, Denial of Petition for Reconsideration (April 30, 2008) ["[T]he Board informed Employer's representative that the Division had referred the case to the Bureau of Investigations (BOI), and processing of the matter would be delayed until completion of BOI's investigation."]; *Sinclair Concrete, Inc*.. Cal/OSHA App. 1123110, Decision After Reconsideration (Feb. 25, 2020) ["The Board stayed Employer's appeal proceedings pending completion of BOI's review."]; see also *BLF*, *Inc. dba Larrabure Framing*, Cal/OSHA App. 02-4675, Decision After Reconsideration (Jan. 7, 2010).)

Employer's petition also attaches a form letter the Board had purportedly sent to another employer in a separate matter in December, 2013. The letter stated,

> Unless you submit a written request asking that your appeal of this case go forward in the normal course, we will delay the processing of your appeal until conclusion of the review by the Bureau of Investigations **(BOI), OR** for **a period of three years from the first day of inspection**—**whichever occurs earlier**. (See **Board regulation 376(c)**)
>
> **If the case is held in abeyance pending the outcome of BOI, any and all motion filed by the parties will be held and not ruled upon until either BOI closes its investigation or the three year period has expired.**

However, after careful evaluation, the Board concludes that neither the decisions cited by Employer, nor the Board's letter in an unrelated matter, compel the Board to stay this entire case. First, the cases and *dicta* cited by Employer do not represent controlling authority, as they do not analyze the contents of section 376 in conformance with the rules of regulatory construction. It is axiomatic that cases are not authority for propositions not therein considered. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [parts of opinion superseded by statute on other grounds].) An opinion is not authority for a proposition the court had no occasion to decide. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Second, even assuming those decisions constituted precedent in support of Employer's position, we disapprove of them. The Board is not bound to follow a prior erroneous construction. (See *L&S Construction*, *Inc*., Cal/OSHA App. 10-1821, Decision After Reconsideration (Oct. 7, 2016).) As stated *ante*, section 376, subdivision (c), by its plain terms mandates only the delay of the hearing; it does not otherwise require the ALJ to stay other aspects of the administrative matter. However, that does not end the present inquiry.

Although section 376, subdivision (c), does not mandate a complete stay of administrative proceedings, it does not preclude an ALJ from exercising discretion to order a broader stay of proceedings. The ALJ has significant discretion to regulate the course of proceedings under section 350.1. Further, the last sentence of section 376, subdivision (c), states, the "Appeals Board may also delay the case beyond three years from the date of the incident on the written request of a party[.]" The last sentence provides ALJ's discretion to delay the "case," not just the "hearing."

"May," as used in that sentence, means permissive. (*County of Orange v. Bezaire* (2004) 117 Cal.App.4th 121, 129.) Therefore, we must now consider whether the ALJ exercised appropriate discretion when denying the request for a broader stay.

Here, again, we discern no error in the ALJ's order. Employer's motion for stay erroneously indicated that a complete stay of administrative proceedings was required as a matter of law. The motion failed to meaningfully advance any arguments that would otherwise prevail in favor of a discretionary stay of proceedings. However, that does not end our inquiry as Employer's petition raises a new argument; its purported constitutional privilege against self-incrimination.

Privilege Against Self-Incrimination:

Within its Petition, Employer argues, for the first time, that administrative proceedings should be stayed in their entirety to preserve its Fifth Amendment privilege against self-incrimination. (Petition, pp. 7-8, citing *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686.) We initially observe that this constitutional argument was not pressed before the ALJ and is therefore arguably waived. However, we consider the argument for two reasons: (1) Employer's confusion as to the requirements of section 376, subdivision (c), was not entirely unreasonable, given the dearth of Board authority on the point and confusing *dicta*; and (2) the application of the self-incrimination privilege in Board proceedings is a matter of general importance to the legal community for which we have little direct authority.

However, before analyzing Employer's privilege assertions, we observe the limitations of our present inquiry. We need not decide whether the hearing should be stayed. Section 376, subdivision (c), already provides, and the ALJ held, that the hearing will be delayed "for a period not exceeding three years, whichever occurs earlier." At present, the only issue before the Board is whether other aspects of the administrative proceeding, including discovery and motions, need be stayed. On this issue, we are guided by relevant California and federal precedent.

The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be witness against himself. The California Constitution contains a substantially identical provision. (Cal. Const., Art I, § 15.) The privilege against self-incrimination not only protects an individual from being forced to testify against themselves in a criminal proceeding, it also protects an individual from being forced to answer official questions in any proceeding, criminal, civil, or administrative. (*Kastigar v. United States* (1972) 406 U.S. 441, 444-445; *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 714.) "It …privileges a person not to answer official questions in any other proceeding, 'civil or criminal, formal or informal,' where he or she reasonably believes the answers might incriminate him or her in a criminal case." (*Spielbaur v. County of Santa Clara*, *supra*, 45 Cal.4th at 714.) "Privileged matters thus lie beyond the reach of discovery and trial courts may not compel individuals to make responses that they reasonably believe could tend to incriminate them or subject them to criminal prosecution." (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 305 (*Fuller*) [other citations omitted].)

However, although privileged matters lie beyond the scope of discovery, the mere existence of a criminal matter does not mean that an Employer is entitled to an automatic and complete stay of a related civil or administrative matter. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 882, 885 (*Avant*); *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324-325; *People v. Coleman* (1975) 13 Cal.3d 867, 884-885.) The constitution does not necessarily mandate a complete stay of civil proceedings, including discovery or motions. (*Ibid.*) The fact that there is a related criminal investigation does not give "a blank check to block all civil litigation on the same or related underlying subject matter. Justice is meted out in both civil and criminal litigation." (*Avant*, *supra*, 79 Cal.App.4th at 882, *citing People v. Coleman* (1975) 13 Cal.3d 867, 884-885.) Similarly, there is no absolute right to the continuance of an administrative proceeding pending the conclusion of a related criminal proceeding. (*Savoy Club v. County Board of Supervisors of County of Los Angeles* (1970) 12 Cal.App.3d 1034, 1038-1040.) "[T]he question of whether a civil proceeding should be stayed pending the outcome of a parallel criminal proceeding often rests not on the constitutional issue of self-incrimination, but on the issue of abuse of discretion." (*Avant*, *supra*, 79 Cal.App.4th at 885.)

California appellate courts, and administrative agencies, have cited, with approval, the Ninth Circuit's analysis in *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324-325 (*Keating*),[5] which states:

> The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Federal Sav. & Loan Ins. Corp. v. Molinaro,* 889 F.2d 899, 902 (9th Cir. 1989); *Securities & Exchange Comm'n v. Dresser Indus.,* 202 U.S. App. D.C. 345, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied,* 449 U.S. 993, 66 L. Ed. 2d 289, 101 S. Ct. 529 (1980). "In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence." *Dresser,* 628 F.2d at 1374. "Nevertheless, a court may decide in its discretion to stay civil proceedings . . . 'when the interests of justice seem[] to require such action.'" *Id.* at 1375 (quoting *United States v. Kordel,* 397 U.S. 1, 12 n.27, 25 L. Ed. 2d 1, 90 S. Ct. 763 (1970)).

"Courts recognize the dilemma faced by a defendant who must choose between defending the civil litigation by providing testimony that may be incriminating on the one hand, and losing the case by asserting the constitutional right and remaining silent, on the other hand." (*Fuller, supra,* 87 Cal.App.4th at 306-310, citing *Avant*, *supra*, 79 Cal.App.4th at 882.) At the same time, courts recognize the need to proceed fairly and expeditiously in disposing of civil cases, efficiently using state resources, and the interests of other parties to the civil matter. (*Ibid*.) To address the

[5] See *Avant, supra,* 79 Cal.App.4th at 885; see also *Alpha Media Resort Investment Cases* (2019) 39 Cal.App.5th 1121, 1131-1132. Notably, the Workers' Compensation Appeals Board has also cited to the *Keating* decision favorably. (*Smith v. Action Roofing, Sussex Ins. Co*., 2016 Cal. Wrk. Comp. P.D. LEXIS 304, *10 (Cal. Workers' Comp. App. Bd. June 1, 2016).)

dilemma, courts have discretionarily fashioned various remedies designed to balance the competing interests, including, without limitation: staying the civil proceeding in its entirety; allowing the civil defendant to invoke the privilege, even if it limits the defendant's ability to put on a defense; or precluding the litigant who claims the privilege from testifying at trial to matters upon which the privilege has been asserted. (*Ibid*.) When it comes to discovery, courts have also allowed discovery to proceed, but allowed objections on a question-by-question basis, to provide a clearer record when devising later procedural accommodations. (*Ibid*.) The choice of procedural tools is based on the circumstances of the particular case and committed to the court's discretion. (*Ibid*.)

Here, Employer cites to the case of *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686 (*Pacers*) in support of its position that the administrative proceeding should be completely stayed until disposition of the criminal matter. There, the court discretionarily stayed the civil case in its entirety. The court held,

> [W]here…a defendant's silence is constitutionally guaranteed, the court should weigh the parties' competing interests with a view toward accommodating the interests of both parties, if possible. An order staying discovery until expiration of the criminal statute of limitations would allow real parties to prepare their lawsuit while alleviating petitioners' difficult choice between defending either the civil or criminal case. […]
>
> This remedy is in accord with federal practice where it has been consistently held that when both civil and criminal proceedings arise out of the same or related transactions, an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter.
>
> (*Id*. at p. 690.)

However, although we do not foreclose the possibility that there may be circumstances where application of the *Pacer* analysis may be appropriate in a specific case, we conclude that the aforementioned *Pacer* decision "is of little precedential value to the issues involved in this petition." (*Avant*, *supra*, 79 Cal.App.4th at 883.) Corporate Fifth Amendment rights were "[e]vidently… not an issue in *Pacers*[.]" (*Ibid*.) In contrast, here, Employer is a corporation, which has no protected right against self-incrimination. (*Avant*, supra, 79 Cal.App.4th at 883-885; *Paul Blanco's Good Car Co. Auto Group v. Superior Court* (2020) 56 Cal.App.5th 86, 103.) Employer has failed to explain how it, as a corporation, possesses or can assert any viable privilege against self-incrimination. Further, even assuming, *arguendo*, that Employer can assert a viable claim again self-incrimination, the constitution still does not necessarily mandate a stay of the discovery

or motions. [6] (*Avant*, *supra*, 79 Cal.App.4th at 882, 885; *People v. Coleman* (1975) 13 Cal.3d 867, 884-885.) As discussed above, the issuance of a stay is discretionary.

Ultimately, when deciding whether to discretionarily grant a stay, and the extent of any such stay, multiple California courts have employed the multi-factor analysis originating from the *Keating* decision. (*Avant*, *supra*, 79 Cal.App.4th at 885-887; *Alpha Media Resort Investment Cases* (2019) 39 Cal.App.5th 1121, 1131-1132; *Bains v. Moores* (2009) 172 Cal.App.4th 445, 483; *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 952.) The *Keating* decision considered "the extent to which the defendant's fifth-amendment rights are implicated." (*Keating*, *supra*, 45 F.3d at 324-325.) In addition, it considered: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. (*Ibid*.) We refer to this approach as "the *Keating* analysis."

We, like the aforementioned California appellate courts, acknowledge the wisdom and prudent nature of the *Keating* analysis and therefore, will likewise adopt and apply it, as necessarily modified to apply to the Board's proceedings. We hold that, in deciding whether to stay proceedings where a party raises the issue of a Fifth Amendment privilege against self-incrimination, an ALJ should first consider whether, and to what extent, any Fifth Amendment rights are implicated. If such rights are potentially implicated, the ALJ should then weigh the following considerations before exercising discretion on a request to stay: (1) the interest of any party opposing the stay and requesting to proceed expeditiously; (2) any burden that may be imposed on the employer, particularly with regard to the privilege against self-incrimination; (3) the interest of the Board in the efficient use of its resources; (4) the interests of persons not parties to the proceeding; and (5) the interest of the public.[7] If the ALJ, after evaluation of the various criteria, believes a stay is appropriate, it may adopt one of the various accommodations discussed herein or devise its own solution that fairly accommodates all parties in light of the circumstances that then exist. (See, e.g., *Fuller, supra,* 87 Cal.App.4th at 306-310.)

---

[6] Indeed, even assuming Employer's employees, management personnel, or shareholders might have some viable privilege against self-incrimination, it does not necessarily follow that the entire matter need be mandatorily stayed. "The strength of this proposition depends on the trial court's ability or lack of ability to fashion a remedy that would protect the employees' Fifth Amendment interests while subjecting the corporation to the compulsion of the discovery procedure." (*Avant*, *supra*, 79 Cal.App.4th at 886.) "There are ways by which a trial court may compel discovery disclosures by a corporate defendant while at the same time protecting the Fifth Amendment rights of its employees."(*Avant*, *supra*, 79 Cal.App.4th at 888.) For example, it has been held that a corporation may be required to appoint an agent or an outsider who could respond, without fear of self-incrimination, to furnish such requested information as was available to the corporation. (*Avant*, *supra*, 79 Cal.App.4th at 884-885, 887-888.)

[7] We also note that the present matter involves unabated Serious and Willful-Serious citations, which typically proceed on an expedited schedule. (§ 373.) In exercising discretion on the request for stay, and the extent of any such stay, the ALJ should also consider the unabated status of the citations, particularly under the fourth and fifth elements of the *Keating* analysis.

Because no party has had an opportunity to address these points and the ALJ has yet to rule upon them, this matter is remanded to hearing operations so that the ALJ may decide whether to issue a stay, or the extent of any such stay, consistent with the analysis set forth herein. The ALJ should set a briefing schedule allowing the parties to address the points herein, and whether a further stay should be discretionarily ordered.

DECISION

This matter is remanded to hearing operations for further proceedings consistent with the guidance and instructions set forth herein.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 04/24/2023