

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

In the Matter of the Appeal of:

**SUNVIEW VINEYARDS OF CALIFORNIA, INC.  
1998 Road 152  
Delano, CA 93215**

**Employer**

Inspection No.  
**1153101**

**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 in the above-entitled matter.

**JURISDICTION**

The Division of Occupational Safety and Health (the Division), inspected Sunview Vineyards of California, Inc. (Employer). On November 17, 2016, the Division issued two citations alleging three violations of California Code of Regulations, title 8.<sup>1</sup> Citation 1, Item 1, alleged a Regulatory violation of section 342, subdivision (a) [failure to report a serious injury]. Citation 1, Item 2, alleged a General violation of section 3660, subdivision (a) [failure to display the rated capacity of an industrial lift truck]. Citation 2, Item 1, alleged a Serious, Accident Related violation of section 3663, subdivision (g) [failure to ensure that industrial trucks not be altered].

Employer filed timely appeals of the citations. Employer asserted a series of affirmative defenses for each citation. Employer also sought discovery from the Division pursuant to sections 372 and 372.1.

On April 21, 2020, Employer filed a Motion to Compel Production and for Sanctions. Employer's motion, relevant here, sought production of the Division's written record of the complaint that precipitated the Division's investigation (hereinafter referred to the "complaint"). The motion stated, "The requested 'complaint' relates to the issue of jurisdiction – the date at which the Division had knowledge of a possible violation, and whether the Division issued citations within six months of that date." (Motion to Compel, p. 3.)

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<sup>1</sup> Unless otherwise specified, references are to California Code of Regulations, title 8.

This motion was heard on May 18, 2020 by Howard Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. The parties argued their positions and the ALJ took the matter under submission.

On August 27, 2020, after taking the motion under submission, and also engaging in an *in camera* review of the complaint, the ALJ issued an “ORDER ON MOTION,” granting Employer’s motion in part, and ordering the Division to serve a redacted copy of the complaint to the Employer within 10 days of issuing the order.

On September 4, 2020, the Division filed a motion requesting a stay of the ALJ’s decision to allow the Division to petition for reconsideration, which the ALJ subsequently granted.

On September 25, 2020, the Division filed a Petition for Reconsideration challenging the ALJ’s decision requiring production of a redacted copy of the written record of the complaint. Employer filed an Answer. The Board took the Division’s petition under reconsideration and stayed the Order of the ALJ pending its decision.

In making this Decision After Reconsideration, the Board engaged in an independent review of the entire record. The Board considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

## ISSUES

1. Should the Board entertain the Division’s interlocutory Petition for Reconsideration?
2. Did the ALJ properly order the Division to produce a redacted copy of the complaint?

## ANALYSIS

### **1. Should the Board entertain the Division’s interlocutory Petition for Reconsideration?**

The Division’s Petition for Reconsideration, which seeks review of the ALJ’s order requiring the Division produce a redacted copy of the complaint, 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.” (*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).) Typically, the Board will not grant reconsideration of an interlocutory ruling. (*Fedex Ground*, *supra*, Cal/OSHA App. 13-1220.) However, this matter falls within an exception to that rule. The Division argues that the ALJ’s Order, notwithstanding the redactions, would improperly reveal the identity of the complainant in contravention to Labor Code section 6309, Evidence Code section 1041, and related regulatory provisions. The Board has found that interlocutory review may be granted when a discovery ruling threatens loss of a privilege against disclosure, for which there is no other adequate remedy. (*Ibid.*, citing *O’Grady v. Superior Court* (2006) 139 Cal. App. 4th 1423, 1439.) Here, since the Division’s Petition for Reconsideration alleges potential loss of an important privilege against disclosure, interlocutory review is appropriate.

## **2. Did the ALJ properly order the Division to produce a redacted copy of the complaint?**

Preliminarily, there is no genuine dispute, nor could there be, that the Division need not disclose the name or identity of a person who submits a complaint to the Division of an unsafe condition. The law is clear. The Division has a privilege, and an obligation, to refuse to disclose the name or identity of a person who submits a complaint to the Division regarding an unsafe condition of employment or a place of employment. That privilege and obligation stems from multiple sources, both statutory and regulatory, including Labor Code section 6309 and Board rules of practice and procedure sections 372 and 372.1. (See also, Evid. Code, § 1041.) Labor Code section 6309, subdivision (c), states,

The name of a person who submits to the division a complaint regarding the unsafe condition of an employment or place of employment shall be kept confidential by the division, unless that person requests otherwise.

Section 372 pertaining to the Board's discovery procedures for the identity of witnesses, states,

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.

Section 372.1, subdivision (f), pertaining to the Board's discovery procedures for access to documents, similarly states,

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.

Here, the present dispute turns on whether, or the extent to which, the duty to maintain the confidentiality of the name and identity of a complainant prevents disclosure of the complaint. Although Employer accedes to redaction of the name of the complainant from the complaint, Employer argues it is entitled to a redacted copy of the complaint. In contrast, the Division argues that the entirety of the complaint should be protected from disclosure, or at least most of it, because it could tend to disclose the identity of the complainant through clues as to the complainant's identity, notwithstanding the redactions ordered by the ALJ.

There is some merit to each of the parties' positions. On the one hand, Employer is correct that the aforementioned statutes and regulations do not necessarily provide the Division an absolute privilege to refuse to disclose the entirety of the complaint. The statutes and regulations protect only the "name" and "identity" of a person who submits a complaint. It does not necessarily follow that each and every part of a complaint, or piece of information, within a complaint need be kept confidential, provided disclosure of such information (or parts thereof) would not reveal

the name or identity of the complainant, either explicitly or by inference. We simply cannot read restrictions into the statutes and regulations that do not exist. In its interpretations, the Board, like the Courts, must be careful not to insert what has been omitted, or to omit what has been inserted—we have no power to rewrite plain statutory (or regulatory) language. (*Estate of Cleveland*, (1993) 17 Cal.App.4th 1700, 1709.) “If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.” (*McCarthy Building Company, Inc.*, Cal/OSHA App. 12-3458, Decision After Reconsideration (Feb. 8, 2016) [other citations omitted].)

Further, Employer presents arguments indicating that production of some portions of the complaint, specifically the date and time the complaint was received, are relevant to its statute of limitations defense. While we do not address the merits of that defense, we do recognize that were the Board to issue an overbroad order completely blocking Employer’s receipt of any portion of the complaint, and specifically the date it was received by the Division, it could potentially hamper Employer’s ability to fully evaluate and assert its statute of limitations defense under Labor Code section 6317.<sup>2</sup>

On the other hand, the Division correctly argues that its not just the name of the complainant that is protected from disclosure, but also the complainant’s identity. (§§ 372, 372.1 [“Nothing in this Section requires the disclosure of the identity of a person who submitted a complaint regarding an unsafe condition ...”]; see also Evid. Code, § 1041.) The concept of identity encompasses more than a name. “Identity” is defined, relevant here, as “the distinguishing character or personality of an individual”<sup>3</sup> or the “set of characteristics by which a person or thing is definitively recognizable.”<sup>4</sup> Therefore, it follows that anything that would reveal, or tend to reveal, the identity of the person who submitted the complaint through their distinguishing or recognizable characteristics is also privileged from disclosure. (*See e.g., People v. Hobbs* (1994) 7 Cal.4th 948, 961-962 [discussing Evidence Code section 1041].) For example, notwithstanding redaction of names, if disclosure of contents within the complaint would tend to disclose the complainant’s identifying distinguishing characteristics, such contents should also be protected from disclosure. (*Ibid.*)

Based on the foregoing discussion, we conclude that Employer is entitled copy of the written record of the complaint to the extent, and only to the extent, that it (1) may be redacted to protect the name of the person who submitted the complaint, and (2) redacted to prevent disclosure of anything that would reveal, or tend to reveal, the identity of the person who submitted the complaint through that person’s distinguishing or recognizable characteristics.

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<sup>2</sup> We also note that no party contends that the date of the complaint will reveal the identity of the complainant. Therefore, this decision does not, and need not, address any allegation that disclosure of the date of the complaint will reveal the identity of the complainant.

<sup>3</sup> Merriam-Webster Dictionary (Online) <[www.merriam-webster.com/dictionary/identity](http://www.merriam-webster.com/dictionary/identity)> [accessed July 21, 2021].

<sup>4</sup> American Heritage Dictionary (Online) <<https://www.ahdictionary.com/word/search.html?q=identity>> [accessed July 21, 2021].

Where the parties dispute the extent to which production of a complaint is appropriate, the ALJ or the Board may engage in an *in camera* review, as has occurred here. (§ 372.6, subd. (d).) However, extreme care and caution must be exercised when determining what information should be produced or redacted. The importance of keeping confidential the name and identities of complainants, as required by these statutes and regulations, cannot be understated. The public interest lays in ensuring safe and healthful workplaces. (See Lab. Code, § 6400, et seq.) It is clear that the public interest would suffer if disclosure were compelled of the names or identities of those persons who complain to the Division of safety violations. A person who knows that their identity will be made public when they disclose alleged safety violations will be loath to cooperate with the Division because they would justifiably believe themselves to be in danger of reprisal. (See e.g., *People v. Hobbs*, supra, 7 Cal.4th at 958.) Further, as the Division correctly notes, what information should be protected may not always be clear. Information that may seem innocuous to a hearing officer might immediately reveal a complainant's distinguishing characteristics to someone familiar with the job site. Consideration must be given to whether disclosure of information will provide other windows to the complainant's identity such as, without limitation, the complainant's point of view, unique knowledge, the whereabouts of witnesses or colleagues, and the style of recounting the subject incident. (Division's Petition, p. 8.)

With the foregoing discussion in mind and after an *in camera* review of the subject complaint we affirm the ALJ in part and reverse the ALJ in part. We concur with the ALJ that the complaint should be produced. However, we depart from the ALJ by requiring additional redactions in order to ensure greater protection for the identity of the complainant.

**The complaint shall be redacted as follows:**

Box 8 should be redacted (as defined below). Boxes 12 through 18 should also be entirely redacted.

We find that the entirety of the typewritten alleged hazard description in Box 8 shall be redacted. It is found, notwithstanding the redactions ordered by the ALJ, that the discussion presented therein may tend to reveal distinguishing characteristics of the complainant, such as point of view, whereabouts, and other identifiers. However, the handwritten portion shall be produced.

**The following shall be produced without redaction:**

Boxes 1 through 7, Box 9, Box 11, and Boxes 19 through 49

There has been no indication, nor do we find, that the information presented within these portions of the form will tend to disclose the identity of the complainant.

This decision is quite narrow. It addresses only the contents of the written complaint in this specific case. There may be case-specific occasions where further, or less, redaction is required and appropriate.<sup>5</sup>

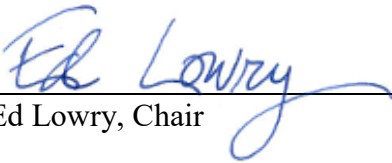
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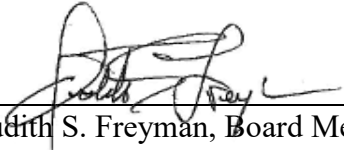
<sup>5</sup> Nothing within this decision should be construed as authorizing or permitting any form of discovery that would reveal, explicitly or by inference, the identity or name of a complainant.

**DECISION**

For the reasons stated above, the written record of the complaint, as redacted, may be produced to Employer. The order will be stayed 30 days to allow the Division to petition for writ of mandate. If no petition is filed after expiration of 30 days, the matter is remanded to the ALJ for further proceedings.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

  
Ed Lowry, Chair

  
Judith S. Freyman, Board Member

  
Marvin Kropke, Board Member



FILED ON: **07/30/2021**