BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **GRIMMWAY ENTERPRISES, INC.** **P.O. Box 81498** **Bakersfield, CA 93380** **Employer**	Inspection No. **1238985** Consolidated with **1477159** **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 petitions for reconsideration filed in the above-entitled matters by Grimmway Enterprises, Inc., (Employer).

JURISDICTION

Employer filed two separate Petitions for Reconsideration on the same day, arising from two inspections at different work sites maintained by Employer. As both petitions involve the same employer and are substantively identical, the Board will therefore address both petitions in this Denial.

Regarding Inspection No. 1238985, beginning on or about June 13, 2017, a representative of the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment maintained by Employer in Arvin, California. Pursuant to its inspection, the Division issued to Employer two Citations alleging serious violations of occupational safety and health standards codified in Title 8 of the California Code of Regulations.[1] Proposed penalties totaled $24,750. Employer timely appealed.

Regarding Inspection No. 1477159, beginning on or about June 2, 2020, a representative of the Division conducted an inspection of a place of employment maintained by Employer in Holtville, California. Pursuant to its inspection, the Division issued to Employer two Citations alleging serious violations of occupational safety and health standards codified in Title 8 of the California Code of Regulations. Proposed penalties totaled $30,600. Employer timely appealed.

Prior to the commencement of proceedings on the merits of Employer's appeals, California Governor Gavin Newsom declared a State of Emergency in response to the COVID-19 pandemic, and issued a number of Executive Orders aimed at controlling the spread of the virus and mitigating its effects. One of these orders, N-63-20, issued on May 7, 2020, suspended all statutes and regulations that would permit in-person hearings, or permit a party to object to an electronic/video

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

hearing, for the duration of the State of Emergency, which is still in effect as of the date of this Board action. Hearings in the above-mentioned matters were set for video hearings on May 26, 2021, and May 25, 2021, respectively.

Employer filed an Objection to Video Hearing and Motion to Stay Hearing (Inspection No. 1238985) and Objection to Video Hearing (Inspection No. 1477159), both on May 3, 2021. Employer's motions were denied and its objections overruled. Employer then timely filed the interlocutory Petitions for Reconsideration at hand, requesting that the Board stay or suspend the Orders pending its Decisions on Employer's Petitions, and, upon reaching a Decision, to grant Employer's requests to either hold in-person hearings or to delay the matters until in-person hearings resume.

ISSUES

Should the Board grant Employer's interlocutory Petitions for Reconsideration?

Does the Board have statutory or regulatory authority to adopt and implement procedures for video (and/or other types of electronically/telephonically conducted "video") hearings?

Does Employer have a constitutional right to an in-person hearing?

REASONS 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 petitions assert that the Appeals Board, acting through the ALJs, acted without or in excess of its powers in issuing the Orders denying Employer's motions to change venue and overruling Employer's objections to a video hearing; that the evidence does not justify the findings of fact; and that the findings of fact do not support the Order. (Lab. Code, § 6617, subds. (a), (c), (e).)

The Board has fully reviewed the records in this case, including the arguments presented in the petitions for reconsideration. Based on our independent review of the records, we find that the ALJ's Orders were based on a preponderance of the evidence in the records as a whole and appropriate under the circumstances.

DISCUSSION

1. The Board need not grant Employer's Interlocutory Petitions for Reconsideration.

Employer's Petitions for Reconsideration are interlocutory in nature, as there has been no final decision on the merits of the Citations. (*Siboney Contracting Co., Inc.*, Cal/OSHA App. 1280908, Denial of Petition for Reconsideration (May 11, 2020).) Board precedent holds that "reconsideration will not be granted concerning interlocutory rulings, reasoning that they are not 'final' orders within the meaning of Labor Code section 6614." (*Garner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013).) The grant of interlocutory review is "extraordinary," and "only exercised sparingly." (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1080515, Denial of Petition for Reconsideration (March 30, 2017).)

The Board has recognized exceptions to the rule against reconsideration of interlocutory orders. The Board "may reconsider interlocutory issues if they involve questions of law, are orders which are effectively final regarding issues independent of a case's merits, or matters which are final as to a particular person." (*Siboney Contracting Co., Inc.*, *supra*, Cal/OSHA App. 1280908.) Interlocutory review may also be appropriate in cases where "the ruling at issue threatens immediate and irreparable harm." (*Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014).) In deciding whether to grant an interlocutory decision, the Board may consider "general principles followed by the courts that allow for interlocutory review." (*Ibid.*)

In this matter, a decision regarding the venue of the hearing is not a decision that is "final independent of … the merits" of Employer's appeal. The hearings itself are necessary to examine and decide those merits. Nor do the ALJ's Orders threaten Employer's appeal with "immediate and irreparable harm." If Employer were to lose its appeals on the merits, it would then be entitled to petition for reconsideration under the applicable Labor Code provisions. (Lab. Code, § 6614 et seq.)

Employer prospectively, and speculatively, argues that compelling it to respond to the Division's evidence by videoconference, and present its own defenses in the same forum, will irreparably harm the ability of Employer's counsel to effectively advocate for Employer. Employer presents no evidence of such harm, nor could it, because none can exist until the hearing is held. Employer also offers no facts or evidence relevant to this particular matter as grounds for its objection to a video hearing. The Division is under the same contraints as Employer in presenting its case to the ALJ, which weighs against Employer's speculation that a video hearing would impair or prejudice its defense.

Employer's arguments that a video hearing would deny its due process rights are merely speculative. The only way to know whether the hearing will be adequate to satisfy due process is to hold the hearing. This is a determination particular to the hearing in question. Given that a party "must prove unfairness as a demonstrable reality, not just speculation[,]" taking the petition under submission is inappropriate. (*P. v. Contreras* (1993) 17 Cal.App.4th 813, 819 [quotes and citations omitted].) If, after the hearing, Employer had reason to believe that it was denied due process, it would then be appropriate to petition for reconsideration on that basis, with specific references to

the alleged deficiencies in the record. (See Lab. Code, § 6616.)

Employer has failed to present a likelihood of injury that rises above the level of unadorned speculation. Employer has offered no evidence specific to these matters that the video forum would cause prejudice or affect the outcome of the matter. (*Vilchez v. Holder* (9th Cir. 2012) 682 F.3d 1195.) It is reasonable beyond mere speculation that granting Employer's requests to hold in-person hearings during the current State of Emergency would risk the health and safety of hearing participants, and would conflict directly with the Executive Orders in force. Employer's arguments that the Board must grant reconsideration to hold an in-person hearing are unpersuasive.

Even assuming, arguendo, that Employer's Petitions for Reconsideration do raise questions of law, which the Board may choose to rule on under the exception to the general rule that interlocutory matters are not appealable, the Board would still decline to reconsider the petitions based on their merits.

We now turn to that discussion.

2. The Board has the authority to adopt and implement video hearing procedures.

At this point, it is unnecessary to introduce readers to the COVID-19 pandemic. Almost 3,675,000 illnesses and 61,800 deaths due to COVID-19 have occurred in California as of this writing,[2] with those numbers continuing to rise every day, and the pandemic continues to have a devastating impact on California's citizens and economy. The United States Supreme Court has recognized that "stemming the spread of Covid-19 is unquestionably a compelling interest." (*Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 67.) The Board has utilized video hearings for the express purpose of advancing that compelling interest in a format that will allow the Board, as a State agency, to continue to timely and efficiently resolve appeals of citations issued by the Division, while also complying with the State's emergency orders. The vast majority of California courts have also adopted video hearings in some, if not all, proceedings.

The Board holds the health and safety of hearing participants to be paramount, and the departure from in-person hearings is not only justified, and permissible under the Board's governing regulations, but necessitated by the State of Emergency and Executive Orders still in effect. Governor Newsom has recently announced that an end to some prohibitions may be soon forthcoming, and at that time the Board will re-consider the options of parties to request in-person, hybrid, or video proceedings.[3] Meanwhile, the Board has made clear, and now reaffirms, that moving all proceedings to the video venue is a temporary measure which will stay in effect until the State of Emergency is lifted.

The unique circumstances of the COVID-19 pandemic have generated a range of litigation in response to various government measures to control and contain the spread of the virus. In California, courts have overwhelmingly agreed that such measures are justified. (See, e.g., *Gao v. Chevron Corp*., 86 Cal. Comp. Cases 44 (W.C.A.B. January 12, 2021) (Appeals Board Significant Panel Decision) [finding that applicant had not demonstrated that he would suffer significant prejudice or irreparable harm if required by COVID-19 precautions to proceed via a video

[2] Source: https://covid19.ca.gov/ (accessed May 24, 2021)

[3] See < https://www.sacbee.com/news/article250468631.html>

hearing]; *Nat'l Retail Federation, et al v. Cal. Dept. of Industrial Relations* (Feb. 25, 2021, CGC20588367) ______ Cal.App.5th _____ [denying injunction of California's Emergency Temporary Standard intended to prevent workplace spread of COVID-19]; *Midway Venture, LLC v. County of San Diego* (2021) 60 Cal.App.5th 58 [finding trial court erred by enjoining the State and County from enforcing COVID-19-related public health restrictions on restaurants and adult entertainment establishments]; *County of Los Angeles Dept. of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478 [issuing a peremptory writ of mandate directing the trial court to set aside its order granting a preliminary injunction of the County's outdoor dining ban enacted to control the spread of COVID-19]; *Stanley v. Superior Court* (2020) 50 Cal.App.5th 164 [finding criminal defendant's due process rights were not violated by prolonged pretrial detention during Emergency Orders related to COVID-19].) This range of decisions adds weight to the Board's similar position that holding video proceedings for the duration of the current State of Emergency is justified and necessitated by the circumstances.

The Board also need not address Employer's attempt to use its Petitions as a forum to challenge the Board's denials of previous, and unrelated, interlocutory petitions for reconsideration submitted by Employer's counsel, also in opposition to video hearings. Employer's objections to the Board's decisions in these separate, unrelated matters are not relevant to the matter at hand.

a. Executive Order N-63-20 prohibits all in-person hearings during the duration of the current State of Emergency.

On May 7, 2020, Governor Newsom issued Executive Order N-63-20, which is still in effect as of this writing, and suspends any regulation or statute that would permit in-person hearings during the pendency of the current State of Emergency, and additionally suspends any statute or regulation that would allow an objection to video hearings. Paragraph 11 states:

> Any statute or regulation that permits a party or witness to participate in a hearing in person, a member of the public to be physically present at the place where a presiding officer conducts a hearing, or a party to object to a presiding officer conducting all or part of a hearing by telephone, television, or other electronic means, is suspended, provided that all of the following requirements are satisfied:
> a) Each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits;
> b) A member of the public who is otherwise entitled to observe the hearing may observe the hearing using electronic means; and
> c) The presiding officer satisfies all requirements of the Americans with Disabilities Act and Unruh Civil Rights Act.

The plain language of the Executive Order suspends in-person administrative hearings for the duration of the current State of Emergency. To the extent that any of the Board's rules would arguably require a physical location, the Executive Order suspends that requirement. Although Employer argues that this Order is unconstitutional, it is nonetheless still in effect, and the Board

must comply with it. Should Employer wish to challenge the constitutionality of N-63-20 in the appropriate forum, it is free to do so.

In issuing Executive Order N-63-20, the Governor acted well within his authority under the Emergency Services Act (ESA) (Gov. Code §§ 8550-8669.7.) The ESA empowers the Governor to declare a State of Emergency "in conditions of … extreme peril to life, property, and the resources of the state" so as to "mitigate the effects of [the emergency]" in order to "protect the health and safety and preserve the lives and property of the people of the state." (Gov. Code § 8550.) For this purpose, the ESA grants the Governor broad authority to address such emergencies. (*Ibid*.) After declaring a State of Emergency, the Governor may, for example, "suspend any regulatory statute … or the orders, rules, or regulations of any state agency … where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." (Gov. Code § 8571.)

The ESA also expressly permits the Governor to "make, amend, and rescind orders and regulations [as] necessary" during a State of Emergency. (Gov. Code § 8567, subd. (a).) In conferring such authority, "the Emergency Services Act makes clear that in situations of 'extreme peril' to the public welfare the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties." (*California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 812.)

Employer cites *CT Freedom Alliance, LLC, et al. v. State of Connecticut Dept. of Education, et al*, Docket no. HHD-CV-20-6131803-S, Superior Court of Hartford (March 8, 2021) (Petition, pp. 13-14), to support its general claim that the current State of Emergency and Executive Order N-63-20 are unauthorized or unconstitutional exercises of executive power. We mention this case only to note that it is not only not controlling as a decision from a lower court in another state, it is also unreported in any official publication and thus entitled to no weight.

A recent appellate court decision, *Newsom v. Superior Court of Sutter County* (May 5, 2021, C093006) _____ Cal.App.5th ____, supports the Board's position. The Court found that the Governor's use of the ESA in the current pandemic is not an unconstitutional abuse of power. Specifically addressing Government Code section 8627, which states:

> During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567,

the Court "interpret[ed] the reference to section 8567 in section 8627 merely as requiring the Governor to comply with the procedure specified in section 8567," i.e., that the Governor's emergency orders be widely publicized before issuance, be in writing, take effect immediately upon issuance, and terminate when the state of emergency is terminated. (§ 8567, subds. (a), (b).)

Upon analysis, the Court concluded that each of these requirements had been satisfied with regard to the Emergency Order at issue. The same requirements were equally satisfied with regard to N-63-20: it was publicized before issuance, was issued in writing, took immediate effect, and will terminate when the state of emergency is lifted.

Paragraph 11 of Executive Order N-63-20 does precisely, and only, what the ESA empowers the Governor to do under emergency conditions. It suspends in-person administrative proceedings until such time as it is safe to resume them. Under the terms of N-63-20, the Board cannot hold in-person hearings during the current State of Emergency. Yet, the Board has a duty to fairly, timely, and efficiently resolve appeals, pandemic notwithstanding. The alternative, suggested by Employer, is to hold no hearings at all. The Board has rejected this option. It would result in a backlog of appeals, causing compounded and cumulative delays, risking the loss of witnesses and evidence, and preventing appeals from being timely, fairly, and efficiently resolved.

After careful consideration, the Board has made the decision to hold hearings in the video venue, as it is authorized to do under its rules and procedures governing the time and place of hearings, and is necessary to avoid the alternative of not holding hearings at all for the duration of the ongoing State of Emergency. The Board has the authority, and the obligation, as part of California's Executive Branch, to act according to the Governor's orders to comply with executive mandates. So long as Executive Order N-63-20 remains in effect, the Board must, and will, comply with it.

b. The Board's own regulations provide the authority to adopt and implement procedures for video hearings.

Employer argues that the Board exceeded its authority granted in the Labor Code and its governing regulations, and engaged in underground rulemaking in adopting and implementing procedures to hold hearings by video or other electronic means. We disagree. Section 376, subdivision (d), of the California Code of Regulations, title 8, states:

> (d) The Appeals Board shall set the place of the hearing at a location as near as practicable to the place of employment where the violation is alleged to have occurred. When making this determination, the Appeals Board's evaluation will include the location of Appeals Board hearing venues, the availability of Administrative Law Judges, the location of the parties and the witnesses.

This regulation gives the Board broad authority to set the hearing venue. To that end, a video hearing is presently the safest, the most reasonable, most appropriate, and least burdensome option, as technology makes it possible for parties and witnesses to attend a hearing from any location, minimizing or eliminating the time and logistical issues associated with travel to a physical hearing venue, in addition to protecting participants from COVID-19 both during travel and at the hearing location. Given that in-person hearings are not an option under Executive Order N-63-20, hearings in the video or otherwise video venue are "as near as practicable" as the regulation requires.

With regard to Employer's argument that the Board has engaged in underground rulemaking, the Board has the authority to set the hearing location. The Board's ALJ's have routinely held prehearing conferences and other proceedings by teleconference since before the current pandemic. At the present time, the health and safety of all parties involved in the hearing process must be the paramount factor for consideration, as well as the health and safety of all workers involved in matters pending before the Board. For this reason, the Board has chosen to conduct hearings by videoconference until such time as it is safe, practical, and permissible for in-person hearings to resume. We emphasize that Executive Order N-63-20 currently undercuts any argument that the Board's regulations require an in-person venue.

The Board has applied the Labor Code and its own governing regulations to permit video hearings during the current State of Emergency, in order to promote safe and healthy working environments by timely resolving appeals during a time when an Executive Order prevents the Board from holding in-person hearings. To do so in this context is within the Board's scope of authority. In addition, it should be noted, video hearings promote a safe and healthful working environment for all participants, including the Board's own employees.

The public's interest lies with enforcement, and timely adjudication, of workplace health and safety regulations, which protect working Californians from demonstrated hazards. (See Lab. Code, § 6300, *et seq*.) This strong governmental interest is stated in the California Occupational Safety and Health Act of 1973 itself, which was "enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for … enforcement in the field of occupational safety and health." (Lab. Code, § 6300.)

Employer cites *Chamber of Commerce of the United States v. United States Dep't of Homeland Security*, Case No. 20-cv-07331-JSW (N.D. Cal. Dec. 1, 2020), to argue that the pandemic does not excuse government agencies from bypassing APA rulemaking requirements. That case is easily distinguishable in that it dealt with interim final rules addressing the H-1B visa program and undocumented workers in the pandemic. Citing the ongoing COVID-19 pandemic and the economic consequences of the pandemic, and in particular the rates of domestic unemployment, the federal Department of Labor (DOL) and Department of Homeland Security (DHS) invoked the federal APA's good cause exception and issued the rules without notice and comment. DOL also invoked the good cause exception to dispense with the APA's normal thirty-day waiting period. The Court held that the agencies failed to "demonstrate that the impact of the COVID-19 pandemic on domestic unemployment justified dispensing with the 'due deliberation' that normally accompanies rulemaking to make changes to the H-1B visa program that even Defendants acknowledge[d] were significant." (*Ibid.* at pp. 4-5.) Here, the information provided by the Board to stakeholders regarding video hearings does not rise to the level of rulemaking.

To the extent that the Board has provided information to stakeholders regarding how to access and use the video meeting format, these publications are not, nor are they intended to be, "regulations" as defined in Government Code section 11342.600. They do not govern Board hearing procedure, but rather, explain how to access the technology involved in video hearings. These are no more "regulations" than a map to a physical courtroom would be. The Board has

done no more than share information on the use of the Zoom platform in order to make the process as simple and transparent as possible for all parties.

The Board therefore acted within its scope of authority, and within the public interest, in utilizing video hearings as the appropriate venue for allowing cases before the Board to proceed during the State of Emergency related to COVID-19, and in providing information on how to access those hearings.

c. The Board has authority under the Government Code to conduct video hearings without APA rulemaking.

Employer argues that the Board is governed exclusively by the Labor Code, and that the adjudicative procedures in Government Code Title 2, Division 3, Chapter 4.5, sections 11400-11475.70 ("Chapter 4.5") therefore do not apply to the Board, unless the Board follows APA rulemaking procedures. As discussed, the Board has authority under the Labor Code and its governing regulations to set the venue for hearings, and, because in-person hearings are currently not an option under Executive Order N-63-20, the Board was within its authority to create and implement procedures for video hearings. In addition, there is a strong argument that the Board has authority to adopt the hearing procedures in Chapter 4.5 of the Government Code.

Government Code section 11410.10 provides, "This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." Government Code section 11410.20 provides, in relevant part, "(a) This chapter applies to all agencies of the state." In addition, Government Code section 11425.20, subdivision (b), states that hearings nay be conducted "by telephone, television, or other electronic means" so long as members of the public have an opportunity to do both of the following:

> (1) At reasonable times, hear or inspect the agency's record, and inspect any transcript obtained by the agency.
> (2) Be physically present at the place where the presiding officer is conducting the hearing.

Based on this statutory language, and if Chapter 4.5 applies to Board proceedings, the Board has authority under the Government Code to conduct video hearings. The only statutory limitation on the Board's authority to conduct video/electronic hearings is a party's objection to the hearing being conducted in a video manner, or if a member of the public wishes to be physically present. (Gov. Code §§ 11440.30, subd. (b); 11425.20, subd. (b).) However, Executive Order N-63-20 specifically suspends the ability of a party or member of the public to object to video hearings on those grounds.

We therefore find that the Board has the necessary authority under the Government Code to require and conduct video hearings, or other video hearings conducted by electronic means, during the current State of Emergency.

3. Does Employer have a constitutional right to an in-person hearing?

Employer argues that the video hearing scheduled by the Board would violate the due process guarantees of the United States and California Constitutions. Specifically, Employer asserts that it has a constitutional right to in-person examination and confrontation of witnesses during the hearing, which will be improperly infringed in a video hearing setting. We reject these arguments as well.

The Ninth Circuit has held that "whether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice suffered by the petitioner." (*Vilchez v. Holder* (9th Cir. 2012) 682 F.3d 1195, 1199.) The Court found that minor technical problems in an administrative hearing held by video conference were not sufficient to establish a violation of due process, nor was the fact that the hearing officer could not examine, in person, an eye injury suffered by the petitioner. In order to establish a due process violation, a petitioner must, at the least, "establish that the outcome of his hearing 'may have been affected' by the fact that his hearing was conducted by video conference." (*Id*. at p. 1200.) Here, the hearings on the merits have not yet occurred, so Employer cannot present any evidence of this kind.

Nor has Employer presented evidence particular to the merits of these matters prospectively demonstrating the degree to which the video conference venue would interfere with the full and fair presentation of Employer's case, or the degree of prejudice which would be suffered by Employer. Employer does mention that, in one of the immediate matters, some potential witnesses are located in Mexicali, Mexico. (Inspection No. 1477159.) In the other, some potential witnesses may need language interpretation services. (Inspection No. 1238985.) Neither of these circumstances renders a video hearing untenable. In fact, a video hearing would be a reasonable solution to the potential problems of hearing testimony from witnesses who are located outside California.

In sum, Employer presents no facts raising a colorable argument that, in either matter at hand, a video hearing would present it from effectively presenting its evidence or cross-examining witnesses. Employer offers only broad arguments that the video format would be insufficient to allow it to present its case. Employer, in short, has not set forth any substantive or persuasive reason why a hearing in either of *these matters* should not be conducted over the Zoom format.

Employer is not being denied the right to present evidence and cross-examine witnesses, only the right for those procedures to occur in person – a constraint which applies equally to the Division. Employer's arguments also fail to consider that other participants in the hearing process have a significant interest in not being potentially exposed to a highly contagious, sometimes fatal or debilitating disease. On balance, in the absence of evidence from Employer, Employer's argument fails. Employer asserts that the Board's choice to prioritize the health and safety of hearing participants, rather than delaying proceedings until in-person hearings are an option, is a baseless appeal to "emotion" and "fear." We disagree. As stated, Employer has failed to present any evidence demonstrating why either matter cannot be heard in the video venue. In the absence of such evidence we cannot evaluate the validity of Employer's objections to these particular video

hearings for any potential merits, and so we can find none. The Board's position is supported by reason and science. And, as matters here, it is supported by law.

The Board's proceedings are administrative in nature. Under the federal and California Constitutions, a party to a civil or administrative proceeding has a right to examine and cross-examine witnesses, and to present evidence. The same right is afforded under the Board's regulations (§ 376.1). It is well established, however, that due process of law does not confer upon a party to civil or administrative proceedings an absolute right to be personally present at the proceedings. (*Vilchez v. Holder*, *supra*, 682 F.3d 1195; *Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 338.)

The California Workers Compensation Appeals Board (WCAB), like the Board, has addressed due process objections to its decision to hold video proceedings during the State of Emergency. WCAB's rationale is well-stated, and analogous to the Board's:

> The WCAB's transition to video hearings is not based upon some bureaucratic whimsy, but rather upon the advent of a global pandemic that has cost the lives of hundreds of thousands, and caused fundamental shifts in the behavior of most of the world's population. Due process is the process that is due under the circumstances as we find them, not as we might wish them to be. Executive Order N-63-20 represents the Governor's best judgment as to how to strike a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from real and significant harm, and the state's responsibilities under the California Constitution to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers. (*Gao v. Chevron Corp.*, *supra*, 86 Cal. Comp. Cases at p. 48.)

In addition, neither the Sixth Amendment nor the California Constitution support a right to in-person confrontation in the administrative context. Although the right of confrontation has been construed as establishing a general right to be personally present during a criminal hearing, this right is limited to "criminal prosecutions," and does not apply to the Board's proceedings. (*Arnett v. Office of Admin. Hearings*, *supra*, 49 Cal.App.4th at 338; *Seering v. Dep't of Social Services* (1987) 194 Cal.App.3d 298, 304.) Employer, however, appears to suggest that Board hearings demand the right of in-person confrontation typically reserved for criminal proceedings, because certain criminal penalties sometimes attach to citations issued by the Division. (Petition, pp. 23-24.) Employer's citation to *Salwasser Manufacturing Co, Inc. v. Municipal Court* (1979) 94 Cal. App. 3d 223 (*Salwasser I*), does not support Employer's assertion on this point. While "a routine inspection under Cal/OSHA partakes of an investigation for the discovery of evidence of a crime," the "premise that Cal/OSHA inspections are criminal in nature … reflects a basic misunderstanding of the Act." (*Id.* at p. 233.) The Court in that case noted that, first, the vast majority of Cal/OSHA inspections do not involve violations that may result in criminal charges; and second, that "the probable cause requirement will arise only in those relatively few situations where the employer refuses consent to an inspection." (*Id.* at p. 234.) A later case, Salwasser II,, reiterated that "the primary purpose of a Cal-OSHA inspection is not to discover evidence of a crime but rather to enforce standards designed to assure safe and healthful working conditions for

employees." (*Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625, 632 (*Salwasser II*).) Employer's implication that a Sixth Amendment in-person right of confrontation should attach to Board proceedings is therefore unpersuasive.

In a more recent case, *Stanley v. Superior Court* (2020) 50 Cal. App. 5th 164, the appellate court held that a criminal defendant's due process rights were not violated by his prolonged pretrial detention during the COVID-19 pandemic, after his trial was delayed for 90 days due to emergency orders issued by Governor Newsom and Chief Justice Tani Cantil-Sakauye, in her capacity as Chairperson of the Judicial Council. The court reasoned that "[g]iven the grave risks to court personnel, jurors, attorneys, and defendant himself that would be created by proceeding in accordance with the normal timeline," the continuance "unquestionably was justified." (*Stanley v. Superior Court*, *supra* at p. 170.) The same reasoning applies here. Administrative hearings are "clearly places of high risk during this pandemic" because they require hearing officers, attorneys, staff, witnesses, and other parties to gather in numbers exceeding safety and health recommendations, in facilities that are ill-equipped to allow for social distancing. (*Ibid*.) Given these risks, the Board's decision to hold hearings in the video venue is equally justified to protect the health of Employer, Employer's counsel, and all other hearing participants. As stated, the alternative would be to hold no hearings at all, and this would serve neither public policy nor the interests of the Board's stakeholders.

While the Board has held video hearings over the past weeks and months, and has taken steps to ensure that the rights of all parties will be protected during those hearings, Employer is merely speculating, without evidence, as to its potential challenges in such areas as the cross-examination of witnesses and presentation of evidence in a video hearing context in this matter. Employer complains that the Board has adopted video hearings as a "one size fits all" solution, but has not offered any evidence specific to these matters to demonstrate that a video hearing would be inappropriate, prejudicial, or would prevent Employer from effectively presenting its case. Nonetheless, Employer broadly claims that its ability to challenge the Division's evidence will be so impaired by the video hearing setting that "the Division has no incentive to refrain from issuing meritless citations." (Petition, p. 24.) As Employer does not allege that the Division has acted improperly in this matter, this hypothetical argument need not be addressed. As established above, Employer has not demonstrated that an in-person hearing in this matter is necessary or justified under the current circumstances.

The Board notes that with the exception of minor technical problems, such as a temporary loss of audio or a participant's screen freezing, which were quickly corrected, video hearings have proceeded without incident and no party has reported any substantive complaints with how these hearings were conducted. Employers as well as the Division and the Board's appointed ALJs have, in fact, responded positively to the convenience and efficiency of video hearings, which allow hearings to be conducted without requiring parties to travel to a physical hearing location. Employer's counsel has itself participated in these hearings to some degree. Employer broadly asserts (again, without evidence specific to these matters) that a video hearing will impair counsel's ability to assess witness credibility, present exhibits, and engage in attorney-client communication. No doubt some challenges do exist. However, the Board has taken pains to address these concerns. The Board has created online tutorials and other educational materials to familiarize stakeholders with the features of Zoom, the video conferencing system utilized for hearings. In a video setting, for example, participants have the ability to present, examine, and annotate exhibits that have been

timely filed with the Board. Zoom accommodates numerous witnesses from various locations. Zoom features a "breakout room" that allows video participants to confer privately; in addition, no rule prevents attorneys and clients from physically co-locating during the hearing. The ALJ assesses witness credibility during video proceedings, just as during in-person proceedings. To the extent that any of these changes are inconvenient, they are merely inconvenient, not unconstitutional, not underground rulemaking, and are necessary and justified given the current, ongoing State of Emergency and associated Executive Orders which prohibit the Board from holding in-person hearings. Ultimately, Employer can only speculate at this point of the proceedings that its rights would be violated by holding a video hearing in this matter. As noted *supra*, that is not sufficient reason to grant reconsideration.

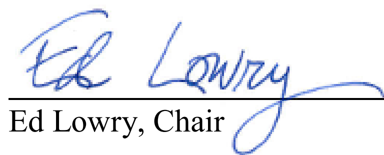
The Board has previously held that it is currently prohibited under N-63-20 from holding in-person hearings; that it is authorized to hold video hearings; that for public policy reasons, holding video hearings is preferable to holding no hearings at all; and that parties must present actual, not speculative, reasons why their due process rights would be infringed by a video hearing. No reason is presented here for the Board to find differently regarding these Petitions.

Given that the Board is currently prohibited under Executive Order N-63-20 from holding in-person hearings, that the Board's governing regulations grant the Board authority to set the venue for hearings, and that the Board has the statutory and regulatory authority to conduct video hearings, Employer's arguments fail.

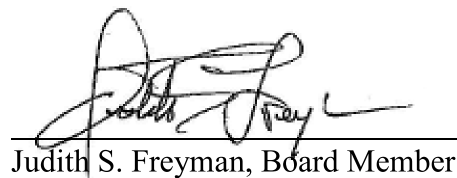
DECISION

For the reasons stated above, both petitions for reconsideration are denied. The ALJ's Orders are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member

Marvin P. Kropke, Board Member

FILED ON: 06/14/2021