

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

In the Matter of the Appeal of:

**KPRS CONSTRUCTION SERVICES, INC.
2850 Saturn Street
Brea, CA 92821**

Employer

Inspection No.
1371294

**DENIAL OF PETITION FOR
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, hereby denies the petition for reconsideration filed in the above-entitled matter by KPRS Construction Services, Inc. (Employer).

JURISDICTION

On August 15, 2018, the Division of Occupational Safety and Health (Division) commenced an inspection of a worksite maintained by Employer.

On February 4, 2019, the Division issued two citations to Employer. Citation 1 asserted a Serious, Accident-Related violation of California Code of Regulations, title 8, section 1509, subdivision (a),¹ alleging that Employer failed to implement its injury and illness prevention plan by failing to identify and evaluate the fall hazard created by an unprotected opening, and by failing to correct that unsafe condition. Citation 2 asserted a Serious, Accident-Related violation of section 1632, subdivision (h), alleging that Employer failed to properly guard a hole into which a person could accidentally walk. Both citations asserted penalties of \$22,500.

Employer appealed the citations, asserting the safety orders were not violated, the classifications were incorrect, the proposed penalties were unreasonable, and various affirmative defenses.

A hearing was scheduled for September 13 and 14, 2022 before ALJ Murad. On August 24, 2022, the Division filed a motion to amend. The motion was brought pursuant to the authority set forth in section 371.2. The proof of service indicates the Division served the motion on Employer via email; however, Employer states the parties had not stipulated to electronic service. (§ 355.3, subd. (g).)

¹ Unless otherwise specified references will be to title 8 of the California Code of Regulations.

The Division's motion sought to amend Citation 2. As noted above, Citation 2 originally asserted a violation of section 1632, subdivision (h), which states, "Floor holes, into which persons can accidentally walk, shall be guarded. . ." The alleged violation description (AVD) stated:

Prior to and during the course of the investigation, including, but not limited to, on August 15, 2018, KPRS Construction Services, Inc. (Controlling, Correcting Employer) failed to protect employees of exposing employers, including, but not limited to AG Construction, to the fall hazards of an unprotected opening in the rooftop steel decking where a roof hatchway was to be installed. As a result, on or about August 7, 2018, an employee of AG Construction (Exposing Employer) walking on the steel decking fell approximately 27 feet to the concrete floor below after stepping into the unprotected opening measuring approximately 3 feet long by 2 feet 6 inches wide, causing him serious injuries.

The Division's sought to amend Citation 2 to instead assert a violation of section 1632, subdivision (b)(1), which states: "Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers." The Division also sought to amend the alleged violation description to change the word "unprotected" to "unguarded" in two places.

On September 6, 2022, Employer filed an opposition to the Division's motion to amend. The first day of scheduled hearing, September 13, 2022, was converted to oral argument on the motion. The hearing was never opened.

Following oral argument, the ALJ requested further briefing to be accomplished by noon on September 14, 2022. Oral argument would then commence at 1:30 p.m. later that day. The briefs were timely filed, and further argument occurred. After review of the briefs and authorities, the ALJ made an oral ruling granting the motion to amend. The ALJ then issued a written Order confirming the oral ruling. The Order continued the hearing until January 24 and 25, 2023

Employer now files an interlocutory petition for reconsideration. Issues not raised in the petition are deemed waived. (Lab. Code, § 6618.)

ISSUE

- 1) Should the Board consider Employer's interlocutory petition for reconsideration?**

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case, including the arguments presented in the Petition. We have taken no new evidence. We conclude the Petition must be denied as interlocutory.

Employer’s Petition challenges the ALJ’s Order granting the Division’s requested amendment to Citation 2. The ALJ’s Order granting the amendment to Citation 2 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. ‘In determining whether a judgment is final or merely *interlocutory*, the rule is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is *interlocutory* only[.]’ [emphasis in original]” (*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 that there are exceptions to this rule, which do allow for review of interlocutory orders, “such as those involving questions of law, orders which are effectively final regarding issues independent of a case’s merits, or matters which are final as to a particular person.” (*Ibid.*)

Here, we conclude that Employer’s petition is premature. As noted in *A.L.L. Roofing & Building Materials Corporation*, Cal/OSHA App. 92-290. Denial of Petition for Reconsideration (Dec 2. 1992),

A motion to amend the citation or appeal seeks an interlocutory determination of the administrative law judge. The Board has long held that a petition for reconsideration may not be filed challenging a judge’s ruling on such matters until the hearing is concluded and the administrative law judge issues a final decision. [...]

In the present case, Employer must wait until completion of the hearing and issuance of a decision to raise any appropriate issues for reconsideration under Labor Code Section 6617. Thus, its petition is premature and must be denied.

The Board will not consider the issue until the hearing is concluded and the administrative law judge issues a final decision. However, to be clear, this denial should not be construed as a decision on the merits of Employer’s various claims concerning the amendment. Employer is free to continue making a record on this point. The Board merely finds the petition premature at this stage.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 12/05/2022

